

No. 10961

United States
Circuit Court of Appeals
For the Ninth Circuit.

THOMAS W. NEALON,

Appellant,

vs.

HARRY W. HILL, a Receiver of Intermountain
Building & Loan Association, a Corporation,
Appellee.

Transcript of Record
In Two Volumes
VOLUME I
Pages 1 to 374

Upon Appeal from the District Court of the United States
for the District of Arizona

FILED

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PAUL P. O'BRIEN,
CLERK

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INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

	Page
Affidavit of James A. Smith.....	34
Amended Bill of Complaint.....	2
Appeal:	
Bond on	272
Certificate of Clerk to Transcript of Record on	285
Designation of Record, Amended (Elizabeth G. Monaghan).....	277
Designation of Appellee, Additional.....	280
Notice of	271
Order Extending Time to Docket Record on	276
Order to Transmit Original Exhibit on...	274
Statement of Points to Be Relied Upon on	374
Stipulation and Designation of Portions of Record to Be Printed on.....	380
Stipulation re Preparation of Record on	283
Bond on Appeal.....	272
Certificate of Clerk to Transcript of Record on Appeal	285

Index	Page
Complaint, Amended	2
Designations of Record on Appeal:	
Amended Designation of Elizabeth G. Monaghan	277
Additional Designation of Appellee.....	280
Stipulation and Designation of Portions of Record to Be Printed.....	380
Final Order Fixing Attorneys' Fees and Expenses and Ordering Payment Due to:	
Elizabeth G. Monaghan.....	239
Thomas W. Nealon.....	243
Findings of Fact and Conclusions of Law on Petition of Elizabeth G. Monaghan.....	229
Stipulation for Filing.....	238
Mandate of Circuit Court of Appeals.....	37
Names and Addresses of Attorneys of Record	1
Notice of Appeal	271
Order Extending Time to Docket Record on Appeal	276
Order Fixing Attorneys' Fees and Expenses and Ordering Payment Due to:	
Elizabeth G. Monaghan.....	239
Thomas W. Nealon	243
Order to Transmit Original Exhibit.....	274

Index	Page
Petition of Elizabeth G. Monaghan for Allowance of Attorneys' Fees	43
Exhibit A—Memorandum of James A. Smith	100
Petition of Thomas W. Nealon for Allowance of Attorney's Fees	108
Reports and Accounts of Harry W. Hill, Receiver:	
Filed March 20, 1940—Portions of Report Only, Consisting of Schedules A, B, C, D, and E.....	222
Filed February 23, 1943.....	248
Reporter's Transcript	286
Exhibit for Petitioner Monaghan:	
B—Petition for Allowance of Attorneys' Fees	339
Set Out at Pages.....	43-108
Exhibits for Petitioner Nealon:	
3—Petition for Allowance of Attorney's Fees	302
Set Out at Pages.....	108-164
4—Deposition of William H. Burges	303
Set Out at Pages.....	164-216
5—Deposition of Samuel L. Pattee	303
Set Out at Pages.....	216-221
6—Certain Paid Bills and Checks of Thomas W. Nealon.....	305

Index	Page
Witnesses for Petitioners:	
McCluskey, Henry S.	
—direct	356
Witnesses for Petitioner, Elizabeth G. Monaghan:	
Clark, E. S.	
—direct	351
Crale, Francis D.	
—direct	347
Gust, John L.	
—direct	339
Monaghan, Elizabeth G.	
—direct	326
Witnesses for Petitioner, Thomas W. Nealon:	
Burgess, William H. (Deposition)	
—direct	165
Dougherty, M. J.	
—direct	316
Jenckes, Joseph J.	
—direct	321
Nealon, Thomas W.	
—direct	292
Pattee, Samuel L. (Deposition)	
—direct	217

Index**Page**

Witnesses for Petitioner, James A.
Smith:

Smith, James A.

—direct 359

Sperry, Ralph E.

—direct 366

Statement of Points to Be Relied Upon on
Appeal 374

Stipulation and Designation of Portions of
Record to Be Printed..... 380

Stipulation for Filing of Findings of Fact and
Conclusions of Law..... 238

Stipulation re Preparation of Record on Ap-
peal 283

VOLUME II INDEX

	Page
Adoption of Statement of Points (CCA)	682
Answer to Petition of Thomas W. Nealon	632
Appeal:	
Adoption of Statement of Points on	682
Bond on	667
Certificate of Clerk to Transcript of Record on	680
Designation by Appellee of Additional Record on (DC)	676
Designation of Contents of Record on (DC)	672
Motion to Transmit Original Transcript to CCA in Aid of	670
Notice of	666
Statement of Points on (DC)	659
Stipulation Designating Parts of Record to be Printed on (CCA)	684
Application of Receiver for Appointment of Attorneys and Order Thereon	376
Bond on Appeal	667
Certificate of Clerk to Transcript of Record on Appeal	680
Designation by Appellee of Additional Portions of Record (DC)	676
Stipulation to Amend	679

Index	Page
Designation of Contents of Record on Appeal, Petitioner's (DC)	672
Docket Entries	669
Final Order Denying Petition and Dismissing Same	657
Final Report and Account of Henry S. Mc- Cluskey, Receiver, and Petitions Praying for Approval Thereof, etc.	396
Exhibits:	
I—Assets in Arizona	477
II—Assets in States Other than Ari- zona	478
III—Disbursements for Repairs and Improvements	478
IV—Letters, signed H. S. McCluskey, Receiver, re Certificates	482-497
V—Real Estate Loans and Real Estate Owned Refinanced through HOLC, etc.	498
VI—Itemization on Loans Paid in Full	501
VII—Real Estate Loans Compro- mised	502
VIII—List of Foreclosures upon which Sheriff's Certificates of Sale were issued from Nov. 30, 1935 to Mar. 31, 1937	504

Index

Page

Exhibits—(Continued)

IX—Notes and Mortgages upon which Payments were being made on April 1, 1937	516
X—Real Estate Sold for Cash and Real Estate Sold on Contract.....	517
XI—Real Estate Owned Situated in Arizona	519
XII—Summary of Book Loss on Realization	521
XIII—Receipts, Disbursements, Off- sets, Transfers and Adjustments, Arizona Office	522
XIV—Instruments filed in Cause No. E-268, Phoenix, by H. S. McClus- key, Receiver, from Dec. 2, 1935 to Apr. 1, 1937	525
XV—Miscellaneous Cases in Justice, Supreme and Federal Courts	576

Minute Entries:

Mar. 3, 1939—Allowance and Payment of Attorney's Fees.....	597
Dec. 20, 1937--Hearing on Petitions for Allowance of Attorney's Fees.....	590
Feb. 18, 1938—Order for Allowance and Payment of Attorneys Fees.....	595

Index	Page
Minute Entries—(Continued)	
Nov. 22, 1944—Granting Motion for an Order Denying and Dismissing Petition of Thomas W. Nealon.....	655
Nov. 24, 1944—Granting Motion Admitting Copy of Record of Elizabeth G. Monaghan v. Harry W. Hill in Support of Petition	656
Nov. 29, 1944—Final Order Denying Petition and Dismissing Same.....	657
Motion for Order Denying Petition and Dismissing Same	653
Motion to Transmit Original Transcript to CCA, and Order Thereon.....	670
Motion to Submit Petition.....	651
Names and Addresses of Attorneys of Record..	375
Notice of Appeal.....	666
Order Appointing Additional Attorney for Receiver	386
Order Appointing Attorneys for Receiver.....	378
Order Approving Final Account of Henry S. McCluskey, etc.....	579
Order Authorizing and Directing Henry S. McCluskey and George A. Mauk, Co-Receiver, to Join with Other Plaintiffs and Employ Idaho Counsel.....	394

Index	Page
Order Authorizing Receiver and Counsel to Make Trip, etc.....	381
Order Following Pre-Trial Conference.....	643
Order for Monthly Allowance of Attorney Fees to:	
Elizabeth G. Monaghan.....	384
John L. Gust.....	389
Thomas W. Nealon.....	385
Order for Monthly Allowance to H. S. McClus- key as Receiver and Directing Payment thereof	383
Order to Transmit Original Transcript as Ex- hibit No. 1.....	670
Order Submitting Motions for Decision.....	653
Order to Show Cause, filed Oct. 15, 1937.....	582
Affidavit of Service.....	586
Order to Show Cause, filed Dec. 20, 1937.....	587
Petition for Allowance and Payment of \$12.- 500.00 upon Account of Fees to Thomas W. Nealon	594
Petition of Co-Receivers for Authority to Insti- tute Suit in Idaho.....	390
Petition of H. S. McCluskey for Making of Monthly Allowance to John L. Gust as Addi- tional Attorney.....	387

Index	Page
Petition of Thomas W. Nealon Requesting Court to Review and Rehear Final Order re Attorney's Fees and Expenses.....	599
Affidavit of Thomas W. Nealon.....	620
Acknowledgment of Service.....	631
Receiver's Petition Praying for Instructions re Trip, and Authorizing Expenses Therefor	379
Statement of Points, Adoption of (CCA).....	682
Statement of Points on which Petitioner In- tends to Rely on Appeal (DC).....	659
Stipulation Designating Parts of Record to be Printed on Appeal (CCA).....	684
Stipulation to Amend Designation by Appellee (DC)	679
Stipulation to Submit on Briefs Without Oral Argument	652

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* Page numbering appearing at foot of page of original certified Transcript of Record.

In the District Court of the United States
For the Federal District of Arizona

No. E-268-Phoenix

GUADALUPE R. GALLEGOS and FRANCESCA GALLEGOS, his wife; INGA G. GUDMUNDSEN; and MATA E. DEXTER, in their own behalf and in behalf of others similarly situated,

Plaintiffs,

vs.

INTERMOUNTAIN BUILDING & LOAN ASSOCIATION, a corporation,

Defendant.

PLAINTIFFS' AMENDED BILL OF COMPLAINT IN EQUITY, WITH PRAYER FOR RECEIVER

Come Now Guadalupe R. Gallegos and Francesca Gallegos, his wife, Inga G. Gudmundsen and Mata E. Dexter, by Elizabeth G. Monaghan, their solicitor, in their own behalf and in behalf of others similarly situated, leave of Court to amend having been heretofore obtained, and for cause of action against the defendant, Intermountain Building & Loan Association, a corporation, state:

I.

That the jurisdiction of this case is conferred upon this Honorable Court by reason of the diversity of the citizenship of the parties hereto.

That the plaintiffs, Guadalupe R. Gallegos and Francesca Gallegos, his wife, Inga G. Gudmundsen and Mata E. Dexter, and each of them, are citizens and residents of the State of Arizona, and all and each of them reside in the County of Yavapai, State of Arizona. [5]

That the defendant is a corporation organized and existing under and by virtue of the laws of the State of Utah, and is a citizen of the State of Utah, its principal place of business being fixed by its Articles of Incorporation at Salt Lake City, State of Utah, and the defendant is now, and has been at all times mentioned herein, doing business within the County of Maricopa, State of Arizona, and maintaining offices for the transaction of business in the City of Phoenix, State of Arizona, and owns property in Arizona.

II.

That each of the plaintiffs herein is a contract creditor of the defendant and each holds an express contract lien to secure the debt of said defendant corporation due to said plaintiff as hereinafter more fully appears.

III.

Plaintiffs further allege that the amount in controversy herein far exceeds, exclusive of interest and costs, the sum or value of \$3,000.00, being to-wit, a sum in excess of \$2,000,000.00, exclusive of interest and costs.

IV.

That the aggregate amount of the debts due to plaintiffs herein and the liens securing the debts

due them by said defendant corporation is in excess of \$3,000.00, exclusive of interest and costs, to-wit, \$6,715.50, exclusive of interest and costs. That the nature of the liens which secure the obligations due to each of these plaintiffs is hereinafter more fully described.

V.

That this bill of complaint is filed in equity for the reason that none of the plaintiffs herein has a full, adequate or complete remedy at law. [6]

VI.

That the plaintiffs bring this action on behalf of themselves and for all others similarly situated who desire to come in and bear their proportion of the expenses of this suit; that the persons so situated are too numerous to be made parties to this action.

VII.

That the amount of the debt due to plaintiffs, Guadalupe R. Gallegos and Francesca Gallegos, his wife, exclusive of interest and costs, is the sum of \$1,155.00, and all of it, together with accumulated interest thereon, is secured by the lien hereinafter mentioned and hereinafter described.

That on, to-wit, the 23rd day of February, 1924, in the County of Yavapai, State of Arizona, plaintiffs, Guadalupe R. Gallegos and Francesca Gallegos, his wife, purchased an "Installment Savings Certificate" No. 10344 from the defendant upon monthly payments of \$11.00 each, and paid thereon a total of \$1,155.00, being equivalent to 105 pay-

ments of \$11.00 each, and the defendant issued to them its "Installment Savings Certificate," dated February 26, 1924, for \$2,000.00, payable at the expiration of 126 months from that date, and promised and agreed with the said plaintiffs that as security for the performance of its obligation thereunder that it would hold intact, subject to the constant examination and inspection of the Banking Department of the State of Utah, first mortgages on improved real estate in an amount equal to at least 100 per cent of its liability thereunder, less the amount of any loans made on it or like certificates or any certificates issued in lieu thereof, and said promise and agreement is incorporated in and made a part of said "Installment Savings Certificate" No. 10344.

That no loan is outstanding or existing upon said certificate nor on any like certificate to these plaintiffs, nor has [7] any certificate been issued in lieu of said certificate.

That said "Installment Savings Certificate" No. 10344 is in words and figures as follows:

"Incorporated under the Laws of the State of Utah.

Maturity Value	Certificate Number
\$2000.00	10344

Intermountain Building & Loan Association	
Number of Shares	Series Number
20	27

Sept. 1923

Installment Stock Certificate

This Is To Certify that Mr. & Mrs. Guada-

lupe R. Gallegos of Prescott, Arizona, is the record owner of the above numbered Installment Savings Stock Certificate issued by the Intermountain Building & Loan Association of Salt Lake City, Utah, of the value, when matured of \$2000.00; that in consideration of the payment by the said Mr. & Mrs. Guadalupe R. Gallegos, his heirs or assigns to the Intermountain Building and Loan Association, at its office in Salt Lake City, Utah, of \$11.00 Monthly, in advance, for ten and one half years from date hereof, the Intermountain Building & Loan Association promises to pay to the said Mr. and Mrs. Guadalupe R. Gallegos, or the then record owner thereof, at the expiration of said period, upon presentation and surrender of this certificate, properly endorsed, to the Intermountain Building & Loan Association, at its General Office in Salt Lake City, Utah, Two Thousand Dollars legal tender money of the United States of America.

This certificate is issued and accepted subject to the provisions of the Articles of Incorporation as amended and the By-laws of the Association and the privileges, terms and conditions printed on the back hereof, all of which [8] are made a part hereof as fully as if set forth on the face of this certificate.

In Witness Whereof, the Intermountain Building & Loan Association has caused this certificate to be executed in its corporate name and its corporate seal to be hereto affixed at

Salt Lake City, Utah, this 26th day of February, 1924.

INTERMOUNTAIN BUILDING
& LOAN ASSOCIATION.

By DANIEL ALEXANDER,
President.

Attest:

THORWALD L. LARSEN,
Secretary.

[Corporate Seal]

Privileges and Conditions

Security. As Security for the performance of the obligations of the Association hereunder, the Association will hold intact, subject to the constant examination and inspection of the banking department of the State of Utah, first mortgages on improved Real Estate in an amount equal to at least one hundred per cent of its liabilities hereunder, less the amount of any loans made on this and like certificates or any certificates issued in lieu thereof.

Payments. The payments hereon made be made monthly, quarterly, semi-annually or annually in advance.

Payments in excess of the yearly payments in advance, shall increase the cash withdrawal value in an amount equal to such payments and accumulated interest credited to such excess payment. Such excess payment may be applied to the installment payment when same shall become due. [9]

Loan Value. Upon depositing this certificate with the Association as collateral security, the Association will lend the registered owner hereof any amount up to ninety per cent (90 per cent) of the then withdrawal value of this certificate, in the way and manner provided in the articles of incorporation and the by-laws of the Association and subject thereto.

Suspension. Payments on this certificate may be suspended from month to month for a period not to exceed six successive months upon written request, provided such written request be filed with the Secretary of the Association at Salt Lake City, before the payment becomes due. The maturity of a certificate on which payments have been suspended, shall be extended for a period equal to the total period of suspension of payments.

Re-instatement. The holder hereof may re-instate this certificate, in the event of default, at any time within six months from the time of default by resuming payments on this certificate. Before the certificate can be re-instated, the holder hereof must forward it to the Secretary of the Association at Salt Lake City, who will reissue it as of a series as many months later than its present series, as the certificate has been in default, and the maturity of this certificate will thereby be extended for a period equal to the total time that default continued.

Neither dividends nor interest shall be credited or allowed upon any certificate during the period that payments on said certificate shall be suspended or while said certificate is in default.

It is agreed that unless otherwise ordered by the Board of Directors, not to exceed 50% of the money received by [10] the Association on stock payments in any one month shall be used to pay cash and death withdrawal values and for making loans on stock certificates, and it is agreed that loans on stock certificates may be made in the order of the filing of application.

Schedule of Payments and Withdrawal Value

Calculated on a \$1,000.00 Certificate

Greater or less amounts in proper proportions

If paid annually in advance.....	\$64.02
If paid semi-annually in advance.....	32.52
If paid quarterly.....	16.50
If paid monthly.....	5.50

Withdrawal Value

Months	Values	Months	Values
24	83.60	78	\$ 457.09
30	116.92	84	514.06
36	151.53	90	572.65
42	188.19	96	634.97
48	223.32	102	700.72
54	263.97	108	770.02
60	306.45	114	843.20
66	355.52	120	920.40
72	404.04	126	1,000.00

Collateral Assignment

For Value Received
 hereby transfer and assign to the Intermoun-
 tain Building & Loan Association the shares

of stock represented by this certificate as collateral security for a loan of dollars this day made to by said association.

Dated at this day of 192.....

Witness:

[11]

Assignment

For Value Received hereby sell, assign and transfer all of the right, title and interest in and to the within shares of stock to of who agrees to all the terms and conditions of the same, and hereby authorizes the transfer of said stock to the said upon the books of the Intermountain Building & Loan Association.

Witness hand this day of, 192.....

Witness

Acceptance

The above assignment is hereby accepted under the terms and conditions named herein.

Dated at this day of, 192.....

Witness:

Received of the Intermountain Building & Loan Association Dollars for full amount due on this certificate and same is hereby surrendered and ordered cancelled this day of 192.....

Witness

No. 10344

Name: Mr. and Mrs. Guadalupe R. Gallegos.

Address: Prescott, Arizona.

INTERMOUNTAIN
BUILDING & LOAN
ASSOCIATION

\$20000.00

INSTALLMENT
SAVINGS

CERTIFICATE" [12]

VIII.

That the amount of debt due to the plaintiff, Inga G. Gudmundsen, exclusive of interest and costs, is the sum of \$3,564.00, and all of it, together with accumulated interest thereon is secured by the lien hereinbefore mentioned and hereinafter described.

That on, to-wit, the 12th day of August, 1924, in the County of Yavapai, State of Arizona, plaintiff, Inga C. Gudmundsen, purchased an "Installment Savings Certificate" No. 12824 from the defendant upon monthly payments of \$16.50 each, and paid thereon a total of \$1,782.00, being the equivalent of 108 payments of \$16.50 each, and the defendant issued to her its "Installment Savings Certificate", dated August 12, 1924, for *for* \$3,0000.00, payable at the expiration of 126 months from that date, and promised and agreed with the said plaintiff that as security for the performance of its obligation thereunder that it would hold intact, subject to the constant examination and inspection of the Banking Department of the State of Utah, first mortgages

on improved real estate in an amount equal to at least 100 per cent of its liability thereunder, less the amount of any loans made on it or like certificates or any certificates issued in lieu thereof, and said promise and agreement is incorporated in and made a part of said "Installment Savings Certificate" No. 12824.

That no loan has been made upon said certificate nor on any like certificate to this plaintiff, nor has any certificate been issued in lieu of said certificate.

That on, to-wit, the 12th day of August, 1924, in the County of Yavapai, State of Arizona, Ida Mae Routon, at that time a citizen and resident of the County of Yavapai, State of Arizona, purchased from the defendant "Installment Savings [13] Certificate" No. 16410; and that subsequently plaintiff Inga G. Gudmundsen purchased said certificate from said Ida Mae Routon and the same was transferred to her upon the books of the defendant corporation, and the said plaintiff continued to make the payments therein contracted for by said Ida Mae Routon, and there has been paid thereon by plaintiff Inga G. Gudmundsen and her predecessor in interest the sum of \$1782.00, being the equivalent of 108 payments at \$16.50 each.

That the defendant issued to said Ida Mae Routon its "Installment Savings Certificate", dated August 12, 1924, for \$3,000.00, (which certificate was subsequently transferred to Inga C. Gudmundsen, plaintiff herein, as above stated), payable at the expiration of 126 months from that date and promised and agreed with the said Ida Mae Routon that as

security for the performance of its obligations thereunder it would hold intact, subject to the constant examination and inspection of the Banking Department of the State of Utah first mortgages on improved real estate in an amount equal to at least 100 per cent of its liability thereunder, less the amount of any loans made on it, or like certificates or any certificates issued in lieu thereof, and said promise and agreement is incorporated in and made a part of said "Installment Savings Certificates" No. 16410.

That no loan has been made upon said certificate nor on any like certificate to this plaintiff, nor has any certificate been issued in lieu of said certificate.

IX.

That the amount of the debt due to the plaintiff, Mata E. Dexter, exclusive of interest and costs, is the sum of \$1,996.50, and all of it, together with accumulated interest thereon is secured by the lien hereinbefore mentioned and hereinafter described.

That on to-wit: the 22nd day of June, 1923, plaintiff, Mata [14] E. Dexter, purchased an "Installment Savings Certificate" No. 7217 from the defendant upon monthly payments of \$16.50 each, and paid thereon a total of \$1,996.50, being the equivalent of 121 payments of \$16.50 each, and the defendant issued to her its "Installment Savings Certificate" dated June 22, 1923, for \$3,000.00, payable at the expiration of 126 months from that date, and promised and agreed with the said plaintiff that as security for the performance of its obliga-

tion thereunder, it would hold intact, subject to the constant examination and inspection of the Banking Department of the State of Utah, first mortgages on improved real estate in an amount equal to at least 100 per cent of its liability thereunder, less the amount of any loans made on it or like certificates or any certificates issued in lieu thereof, and said promise and agreement is incorporated in and made a part of said "Installment Savings Certificate" No. 7217.

That no loan has been made upon said certificate nor on any like certificate to this plaintiff nor has any certificate been issued in lieu of said certificate.

X.

That each of the certificates issued to the plaintiffs herein by the defendant herein contains the identical provisions as to the security and the creation of a lien to secure the payment of the indebtedness represented by said certificate, as are contained in Certificate No. 10344 hereinbefore set up.

XI.

That the nature of the lien securing the obligations of the defendant to these plaintiffs and each of them, as hereinbefore referred to, is, that as security for the performance of the obligations of the defendant herein it will hold intact subject to the constant examination and inspection of the Banking Department of the State of Utah, first mortgages on improved [15] real estate in an amount equal to at least 100 per cent of its liabilities

under its contracts with plaintiffs herein and under its contracts with others similarly situated, less the amount of any loans made by the defendant on any of the certificates issued to any of the plaintiffs herein or to persons similarly situated, on like certificates held by them.

XII.

That the said plaintiffs, Guadalupe R. Gallegos and Francesca Gallegos, his wife, fully performed all of the conditions of their contract with the defendant up to the 16th day of May, 1932, and not then being in default in their payments, did, prior to the 8th day of June, 1932, in accordance with the terms of their contract with the defendant herein, give notice of intention to withdraw, which notice of intention to withdraw was acknowledged by the defendant herein and filed by the defendant in its office as of June 8, 1932; but the defendant herein has failed, neglected and refused to carry out its contract with these plaintiffs and has failed, neglected and refused to pay them the sums due as the withdrawal value of said certificates, and has been in default thereon for a period of more than eight months. That the defendant being now insolvent does not own any funds out of which it could pay the agreed withdrawal value of said certificate without applying thereto assets on which other creditors of the corporation hold a lien.

XIII.

That the plaintiff, Inga G. Gudmundsen, complied fully with the terms of her contract with the de-

fendant up to the payment due in March, 1933, when, on learning that the defendant herein was insolvent and unable to carry out the terms of its contract with the plaintiff and was not meeting its obligations, she declined to make any further payments. [16]

XIV.

That the plaintiff, Mata E. Dexter, complied fully with the terms of her contract with the defendant up to the payment due in March, 1933, when on learning that the defendant herein was insolvent and unable to carry out the terms of its contract with the plaintiff and was not meeting its obligations, she declined to make any further payments.

XV.

That in, to-wit, the year 1922 the defendant herein applied to the Arizona Corporation Commission of the State of Arizona for a permit to do business within the State of Arizona.

XVI.

That the defendant corporation failed and neglected to file with the Corporation Commission of Arizona its by-laws as was required by the statutes of Arizona, and never has filed same and none are now on file with the Arizona Corporation Commission; and are not of record in this State.

XVII.

That it is provided by the statutes of Arizona that the liability upon agreements of the nature and kind of contracts and agreements that are the sub-

ject matter of this suit, shall at all times be the amount paid on account thereof, together with interest at the rate of six percentum thereon, and it is further provided that whenever corporations similar in character to the defendant shall be unable to pay off all debts due to creditors and to pay to holders of its outstanding contracts or agreements the amount paid on account thereof, together with interest at the rate of six per cent per annum thereon, such corporation shall be deemed to be insolvent.

XVIII.

That although the defendant herein contracted with the plaintiffs and each of them that it would hold intact, subject [17] to the constant examination and inspection of the Banking Department of the State of Utah, first mortgages on real estate in an amount equal to at least 100 per cent of its liability thereunder, less the amount of any loans made thereon, plaintiffs are informed and believe, and therefore, allege, that the defendant failed and neglected to do so, and still fails and neglects to do so.

XIX.

Plaintiffs further allege that the defendant is now insolvent and its liabilities exceed its assets in a sum in excess of \$400,000.00; that its obligations of the same nature as those to the plaintiffs herein, which are secured in the same manner as the obligations to the plaintiffs herein, exceed in amount the sum of \$2,300,000.00, exclusive of accumulated interest, and on part of these certificates the interest

has been accumulating for more than ten years without any payment thereon whatsoever.

XX.

Plaintiffs further allege that the defendant herein does not now own real estate mortgages in excess of the sum of \$1,600,000.00 at their face value; that as a consequence thereof it cannot now carry out its contracts with the plaintiffs and those similarly situated, by holding intact mortgages to secure the indebtedness in the amount of 100% of its liabilities thereunder as provided in its contracts, and it has not enough of such mortgages on hand to secure even 60% thereof.

XXI.

That the defendant herein has failed to segregate the securities for the payment of its obligations to plaintiffs, and those similarly situated, and has disposed of the funds derived from collections made upon its real estate mortgages in a manner contrary to law and in a manner that has passed the control [18] thereof from the defendant, and as a result thereof, the assets of the corporation and the securities to which these plaintiffs, and others similarly situated, are entitled, are hopelessly mingled and entangled, and it is necessary that a receiver be appointed to make an equitable segretaion and distribution of securities and recover the securities so wrongfully disposed of by the defendant.

XXII.

Plaintiffs further allege that the controlling interest in the stock of this corporation has been acquired by a rival corporation, and that the affairs of this corporation are being run in the interest of said rival corporation and its owners, officers and stockholders without regard to the rights of the plaintiffs and others similar situated.

XXIII.

That the said defendant has been unable to carry out its obligations to the plaintiffs, and those similarly situated, for a period of more than twelve months prior to the filing of this complaint.

XXIV.

Plaintiffs further allege that this corporation has from its inception been hopelessly mismanaged and that the expenses incurred in the operation thereof have each year been far in excess of its income, after deduction from its gross income of the interest liability incurred by it on its obligations, and that in no single year during its operation has it made its expenses, and that as a consequence thereof it never accumulated any profits, and has been hopelessly insolvent for a period of more than seven years; that despite the fact that said defendant corporation has been conducted at a loss for all of these years, it has declared and paid dividends to its stockholders, although hopelessly insolvent at the time of the declaration and payment [19] of such dividends; that in no year since its inception has the

maximum amount of income which it would have been entitled to collect from the mortgages and other securities it owned or earnings derived from any other source, been sufficient to pay its expenses and the accumulated interest due to the plaintiffs, and others similarly situated.

XXV.

Plaintiffs further allege that defendant herein has paid large sums of money to withdrawing certificate holders, holding certificates similar to those of plaintiffs herein, while it, the defendant, was insolvent, the result being that some of the certificate holders have been paid in full while plaintiffs and those similarly situated will receive under any circumstances only a portion of the moneys due them.

XXVI.

That it has transferred many of its assets to other corporations and will continue to do so, unless this court appoints a receiver to take possession of the assets of the defendant within the State of Arizona, and apply them upon the obligations which the defendant contracted to secure.

XXVII.

That the defendant herein is advertising that it, together with other corporations known as "Intermountain Building and Loan Group", have a paid-in capital surplus in excess of \$8,000,000.00 and is holding itself out to the public and inducing the public to invest its money by such false representa-

tions. That in so doing it is imperiling the assets of the defendant, subjecting it to actions at law and suits in equity that will destroy its assets and will destroy the securities covered by the lien of plaintiffs and those similarly situated.

That one of said advertisements, which has been widely circulated in the City of Phoenix and County of Maricopa, State of Arizona, is in words and figures as follows: [20]

“6%

Compounded Semi-Annually

on

Your Savings

INTERMOUNTAIN BUILDING AND

LOAN ASSOCIATION

Phoenix, Arizona

Member of

INTERMOUNTAIN BUILDING AND

LOAN GROUP

Intermountain Building and Loan Association
of Utah

First National Building and Loan Association
Home Building and Loan Company

Equitable Savings and Loan Association

Western Mutual Building and Loan Association

Intermountain Building and Loan Association
of Arizona

COMBINE PAID-IN CAPITAL SURPLUS

\$8,250,000.00

INTERMOUNTAIN BUILDING AND LOAN
ASSOCIATION

106 South Central Avenue

SAVINGS WITH SAFETY"

XXVIII.

That suits and actions have been filed against the defendant herein and are at issue and others are threatened and many of the holders of certificates have placed their claims in the hands of attorneys for collection and suit, and many creditors will obtain judgments against the defendant, sell the securities to which the plaintiffs and those similarly situated are entitled to have applied equally upon the certi- [21] ficates held by them and others similarly situated all to the great loss to plaintiffs and those similarly situated and an imperious necessity exists that a receiver be appointed immediately and without notice in order to prevent such multiplicity of actions and suits against the defendant and to prevent judgments in the suits now pending against the defendant and in actions and suits which are now threatened against the defendant.

XXIX.

That the corporation is not functioning for the purpose for which it was incorporated; is doing practically no new business, nor any profitable business, and has lost the confidence of the public to

such an extent that it can never be profitably conducted, and has lost all right to do any new business in Arizona.

XXX.

That the certified copy of the Articles of Incorporation and Amendments thereto, filed with the Arizona Corporation Commission show the following provisions with regard to the issue and nature of stock and the par value thereof, as follows:

“ARTICLE VI.

The subscribed capital stock of this corporation shall be Five Million Dollars, divided into three classes of stock, to-wit:

A. Expense Guarantee Stock;

B. Permanent Reserve Guarantee Stock;

C. Investors' Guarantee Dividend Stock;

which said stocks shall be issued in amounts as follows:

1. Ten Thousand shares of Expense Guarantee Stock of the par value of One Dollar per share, payable by the subscriber as follows, to wit: Five cents per share on subscription and the balance on call by the Board of Directors, which said [22] call shall not at any time exceed five cents per share, nor shall any call be made under thirty day periods. When such payments and all accumulated receipts credited to said stock shall equal One Dollar per share, said stock shall be fully paid and shall stand as a permanent stock to guarantee the expense of this corporation.

2. One Hundred Thousand Shares of Permanent Reserve Guarantee Stock of the par value of One Dollar per share, payable by the Subscriber as follows, to wit: Five cents per share on subscription, the balance on call by the Board of Directors which said call shall not at any time exceed two cents per share, nor shall any such call be made under ninety day periods. When such payments and all accumulated receipts credited to said stock shall equal One Dollar per share, said stock shall be fully paid and shall stand as a permanent stock, which shall be held to protect the corporation and guarantee all stocks, bonds, securities and creditors against loss.

3. Forty-eight Thousand Nine Hundred Shares of Investors Guarantee Dividend Stock of the mature par value of One Hundred Dollars per share, payable by the Subscriber in one installment or on such suitable installment plans as the Directors of this Corporation may by resolution enact. The Investors Guarantee Dividend Stock, when matured may be withdrawn by the owner thereof after giving thirty days' written notice to the company of intention to withdraw. The Investors Guarantee Dividend Stock may be withdrawn before maturity and the surrender value thereof received by the owner of said stock upon such terms and conditions and subject thereto as the Directors of this corporation may determine from time to time by resolution or as fixed by the by-laws of

the corporation. All withdrawals of Investors Guarantee Dividend Stock whether the same be made before or [23] after maturity shall be paid from the Investors Guarantee Dividend Stock Fund in the way and manner and as provided by law, these Articles of Incorporation and by-laws of this corporation.”

XXXI.

That said Articles show the following provisions with regard to the conditions under which directors would be eligible to the elected, as follows:

“ARTICLE VII.

The management of the affairs of the association shall be vested in a Board of Directors, which shall consist of seven (7) persons, divided into three classes. Directors of the First Class shall be three (3) in number, and shall be elected for a term of one (1) year. Directors of the second Class shall be two (2) in number and shall be elected for a term of two (2) years, and Directors of the third class shall be two (2) in number and elected for a term of three (3) years, so that the term of office of one class shall expire in each year, and shall be elected at the regular annual stockholders’ meeting, provided, that at the first regular stockholders’ meeting there shall be elected a total of seven (7) directors to serve for the respective terms, and provided, further that all directors shall serve until their successors are elected and qualified. No person shall be eligible to the

office of Director of this association who is not the owner of at least Five Hundred (500) shares of stock as shown by the corporation's books. The number of directors of the association may be increased or decreased to any legal number by resolution of the Board of Directors. The Board of Directors shall select and appoint such employees and agents as they might deem advisable, define the authority of each and prescribe his duties. Seven [24] of the incorporators hereof shall serve as Directors until the next annual stockholders' meeting and until their successors are elected and qualified.

XXXII.

That an imperious necessity exists for the immediate appointment of a receiver in order that the property of the defendant may be immediately placed in custodia legis and the receiver placed in possession of the assets of the defendant within the State of Arizona and apply them upon obligations which the defendant contracted to secure; to avoid a multiplicity of suits and actions against the defendant; to prevent a waste of its assets in litigation and forced sales; to avoid the loss of the \$6000.00 per month that is now being expended as expenses of the defendant in excess of its monthly earnings; that the income from its mortgage loans be husbanded to meet the accumulating interest charges and the principal of the lien indebtedness due to plaintiffs and others similarly situated; to take possession of and protect the real estate owned by the defendant corporation within the State of

Arizona and collect the rents accruing thereon; to prevent the removal of the assets of the defendant from the State of Arizona, including the books and records of the defendant corporation which are now within the jurisdiction of this Court, for the reason that the books and records of the defendant are necessary for the preservation of the rights of plaintiffs and others similarly situated; to eliminate the useless expense and extravagance that is wasting the assets of the corporation as it has been wasted heretofore during the whole period of its existence; to recover assets of this corporation wrongfully transferred to other corporations before rights of innocent purchasers accrue in regard to them; to prevent any other liens being procured by judicial proceedings or otherwise against the property of the defendant corporation which would be superior to the rights of [25] plaintiffs and those similarly situated, and to prevent irreparable loss and damage to these plaintiffs and others similarly situated.

XXXIII.

For these reasons it is necessary that a restraining order issue forthwith restraining and enjoining defendant, its officers, agents, employees, deputies and servants and all persons acting by, through or under it, or its successors or assigns, from removing, concealing, or destroying or disposing of any of the files, papers, records, documents, monies, securities, choses in action, books of accounts and all other property of the defendant now within the State and District of Arizona and the jurisdiction

of this Court, until the application for the appointment of a receiver herein can be heard and determined.

Wherefore, Plaintiffs Pray:

(1) That this Court make an order and decree establishing the lien of each of the plaintiffs herein and each person similarly situated, upon all of the real estate mortgages held or owned by the defendant corporation on behalf of themselves and others similarly situated, and finding and determining the amount of the lien of each of the plaintiffs herein and those similarly situated, and determining the amount of the indebtedness to each of the plaintiffs herein and to those similarly situated; and that a receiver be appointed in this suit to take possession of all of the assets of said defendant corporation in this State, and all of its books and records; and that said receiver be instructed to report to the Court a segregation and partition of all of the real estate mortgages held by the defendant herein and apply them as security to the debts due the plaintiffs individually and others similarly situated individually; and that an account be taken of all of the affairs [26] of said defendant and that the Court upon said report by the receiver make such orders and decrees with reference thereto as to the Court may seem meet and proper.

(2) That a receiver be appointed for the defendant herein with authority to take into his possession all of the assets of said corporation and all of its books, records and accounts, including all choses in action.

(3) That said receiver be authorized, directed and instructed to take possession of all of the effects of said defendant corporation, including its real property, and to continue and operate the business of the defendant, subject to the orders of this court; that he shall take charge of all of the real estate of the defendant, keep the same in good condition and repair, and collect the rents thereof.

(4) That such receiver shall have authority to employ, pay and discharge from time to time in his discretion all needful laborers, servants, agents, attorneys and counsel; to purchase and pay for all needful materials and supplies; to pay all taxes on the property whereof he is appointed receiver that may be due or payable or may become due and payable during his receivership; to prosecute and defend without further order of this Court all existing actions by or against said defendant, and to defend all actions that may hereafter be brought against said defendant corporation, or against himself as such receiver by the permission of this Court; to pay the expenses of such prosecutions and defenses; and also the expenses and disbursements of the plaintiffs in and about the appointment of said receiver; to use the name of the defendant in the prosecution of all such actions that he may find it proper or necessary in his discretion to bring, maintain or defend, with full power to compromise, adjust and settle in his discretion all such actions, suits or controversies now [27] existing or that may hereafter exist, subject always to the confirmation thereof by this Court.

(5) That as soon as may be after said receiver has entered upon the performance of his duties, he shall make a true, full and correct inventory of all and singular the real and personal property of every kind and description whereof he is appointed receiver, and which may come into his possession, and file the same with the Clerk of this Court, and due notice of said filing be given to plaintiffs' solicitor.

(6) Said receiver shall keep a full, true and accurate account of all and singular his acts and doings in the premises; render and file with the Clerk of this Court such accounts, and shall also ascertain and furnish this Court with a true statement of the assets and liabilities of said corporation as they shall be obtained by him as Receiver, and for this purpose he shall be authorized to employ an auditor to assist him in such work.

(7) That the Court establish by decree the amount due to plaintiffs, and all others similarly situated, and the amount of real estate mortgages that shall be apportioned to them under their liens as set up in this complaint, and that the receiver shall be instructed to segregate the same and hold them subject to the rights of these plaintiffs and all persons similarly situated, and be subject to the inspection of all parties interested.

(8) That a temporary receiver of said defendant be appointed with the usual powers of temporary receivers in like cases, including all the powers heretofore enumerated in this prayer.

(9) That a permanent receiver of the defendant corporation be appointed with the usual powers of receivers in [28] like cases, including all the powers heretofore enumerated in this prayer.

(10) That a temporary receiver be appointed for all the property of the defendant within the State of Arizona, said receiver to have the usual powers of receivers in like cases, including all the powers enumerated in this prayer.

(11) That a permanent receiver of the defendant corporation be appointed for all the property of the defendant corporation within the State of Arizona, said receiver to have the usual powers of receivers in like cases, including all the powers enumerated in this prayer.

(12) That said receiver be authorized and directed to take possession of all of the monies, assets and property of the defendant Intermountain Building and Loan Association, and hold and operate the same pending the final determination of this action.

(13) That an accounting be had between the defendant corporation and each of the plaintiffs herein and of all others similarly situated, and a judgment, order and decree be rendered herein in favor of each of them for such amount as may be found to be due them by the defendant herein and a lien established, upon the real mortgages in possession of the defendant or that may hereafter come into the hands of the receiver to be appointed herein in accordance with the contract set up in this complaint.

(14) That pending a hearing upon plaintiffs' application for the appointment of a receiver, a temporary restraining order be granted forthwith without formal notice, restraining and enjoining defendant, its officers, agents, employees, deputies and servants and all persons acting by, through or under it, or its successors or assigns, from removing, concealing, destroying or disposing of any of the files, papers, [29] records, documents, monies, securities, choses in action, books of account, and all other property of the defendant now within the State and District of Arizona and the jurisdiction of this Court, until such time as plaintiffs' application herein for the appointment of a receiver be heard and determined.

(15) That the Court grant to your plaintiffs a writ of subpoena of the United States issued out of and under the seal of this Honorable Court, directed to said defendant, and commanding it on the day therein to be named, and under certain penalty, to be and appear before this Honorable Court, then and there to answer all and singular the premises, and to stand and perform and abide by such order, direction and decree as may be made against said defendant in the premises.

(16) That plaintiffs have such other and further relief as to the Court may seem meet and proper, or to which they may be entitled, either at law or in equity.

(17) That plaintiffs have their costs herein incurred.

(18) And your plaintiffs averring that this is the first application for an injunction touching on the matters set forth in said complaint and will ever pray.

ELIZABETH G. MONAGHAN
Solicitor for Plaintiffs,
Prescott, Arizona.

State of Arizona,
County of Maricopa—ss.

Elizabeth G. Monaghan, being first duly sworn on oath, deposes and says:

That she is solicitor for each of the plaintiffs in the above entitled action and has been duly authorized by each of them to make this verification for and on behalf of each of them; that she has read the foregoing complaint and knows the [30] contents thereof; that she has knowledge of the facts upon which relief is asked in said complaint and knows that this suit is not a collusive one to confer on the court of the United States jurisdiction of a case of which it would not otherwise have cognizance. That the allegations in said complaint are true in substance and in fact.

ELIZABETH G. MONAGHAN

Subscribed and sworn to before me this 9th day of June, 1933.

(Notarial Seal)

BESS M. WHITE

Notary Public

My commission expires: June 18, 1935.

Received copy of the within instrument this 19 day of June, 1933.

R. G. LANGMADE

Solicitor for Defendant.

[Endorsed]: Filed Jun 23 1933. [31]

[Title of District Court and Cause.]

AFFIDAVIT

United States of America,
State of Arizona,
County of Maricopa.—ss.

James A. Smith, being first duly sworn, on oath deposes and says:

That he is a certified public accountant and has been for many years engaged in that line of work and is familiar with the accounting methods employed in corporations of the nature of the defendant in the above entitled cause.

That at the instance of the solicitor of the plaintiffs in the above entitled suit he examined the affidavits of Kathleen Nelligan and Gertrude Casto hereto attached, together with the copies of the statements and reports of the defendant in this action filed in the office of the Bank Commissioner of the State of Utah. That the affidavits of said Kathleen Nelligan and Gertrude Casto are to the effect that the copies of the reports of the defendant attached to their affidavits are true and correct copies of the statements and reports of the defend-

ant filed with the Bank Commissioner of the State of Utah.

That he has also examined the affidavit of Elizabeth G. [32] Monaghan hereto attached and examined and checked the calculations upon which her affidavit is based and that he found her calculations to be true and correct and the results arrived at and set up in her affidavit as to the financial condition of the defendant corporation to be correct.

That your affiant has checked each of the statements attached to said affidavits of Kathleen Nelligan and Gertrude Casto as to the assets and liabilities of the defendant and as to its receipts and disbursements, and that from these records, assuming the facts stated in said affidavits to be true and assuming that the verified reports of the defendant filed with the Bank Commissioner of the State of Utah, copies of which are attached to the affidavits of Kathleen Nelligan and Gertrude Casto, are true and correct, this affiant finds from an examination thereof and a checking of all of its facts and figures, that defendant in this suit is now and has been for a period of more than seven years, insolvent, and that its liabilities have exceeded its assets during all of said period of seven years, and do now exceed its assets.

Affiant further states that he has found from a calculation based on said affidavits and reports, that during the entire period from 1921 to 1932, inclusive, the expenses of doing business of said defendant, together with the interest liability incurred by it upon installment savings certificates and other

forms of indebtedness has been in excess of the maximum amount of income it could have received from the interest upon real estate mortgages and other securities held by it, together with any other forms of income that it has reported to the Bank Commissioner during these periods in its verified statements as shown in the affidavits hereinabove referred to.

That assuming the facts stated in said affidavits and reports are true, the said defendant is now insolvent and its liabilities exceed its assets in a sum in excess of \$400,000.00, [33] and that the outstanding obligations to the plaintiffs herein and others similarly situated exceed in amount the sum of \$2,300,000.00, exclusive of accumulated interest, and part of the interest has been accumulating for more than ten years without any payment thereon whatsoever, and that the defendant does not own or hold real estate mortgages in excess of the sum of \$1,600,000.00; that the defendant herein has been insolvent for more than seven years prior to the making of this affidavit; that the said records, files and verified reports in the office of the said Bank Commissioner of the State of Utah, as shown by the affidavits herein referred to, show an aggregate loss from the time that the defendant first started its business up to and including the 31st day of December, 1932, in excess of the sum of \$500,000.00, and that its loss during the year 1932 was in excess of \$70,000.00.

JAMES A. SMITH, C.P.A.

Subscribed and sworn to before me this 8 day of April, 1933.

(Notarial Seal) WM. G. FLAY,
Notary Public

My commission expires August 21, 1933.

[Endorsed]: Filed Apr. 18, 1933. [34]

United States Circuit Court of Appeals
for the Ninth Circuit

No. 7516

INTERMOUNTAIN BUILDING & LOAN ASSN.
et al.,

vs.

GUADALUPE R. GALLEGOS, et al, etc.

MANDATE

United States of America,—ss.

The President of the United States of America
To the Honorable the Judges of the District Court
of the United States for the District of Arizona
—Greeting:
(Seal)

Whereas, lately in the District Court of the
United States for the District of Arizona, before

you, or some of you, in a cause between Guadalupe R. Gallegos, and Francesca Gallegos, his wife, Inga G. Gudmundsen, and Mata E. Dexter, in their own behalf, and in behalf of others similarly situated, plaintiffs, and Intermountain Building and Loan Association, a corporation, defendant, Edward O'Reilly, Kitty R. Crossman, and Frank W. Nelson, Intervenor, H. C. Smoot, and Sophia Smoot, Intervenor, No. E-268, an order was duly entered on the 10th day of April, 1934, and an Order Appointing Receiver Pendente Lite, was duly filed on the 20th day of April, 1934, which said orders are of record and fully set out in said cause in the office of the Clerk of said District Court, to which reference is hereby made, and the same is hereby expressly made a part thereof, and as by the inspection of the Transcript of the Record of the said District Court, which was brought into the United States Circuit Court of Appeals for the Ninth Circuit by virtue of an appeal prosecuted by Intermountain Building and Loan Association, a Corporation, and J. A. Malia, Bank Commissioner of the State of Utah, as appellants, against Guadalupe R. Gallegos, and Francesca Gallegos, His Wife, Inga G. Gudmundsen and Mata E. Dexter, in their own behalf and in behalf of others similarly situated, H. C. Smoot and Sophia Smoot, his wife, as appellees, agreeably to the Act of Congress in such cases made and provided, fully and at large appears:

And Whereas, on the 28th day of February in the year of our Lord One Thousand, Nine Hundred and Thirty five the said cause came on to be heard before the said Circuit Court of Appeals, on the said Transcript of the Record, and was duly argued and submitted. [35]

On Consideration Whereof, it is now here ordered, adjudged and decreed by this Court, that the orders of the said District Court in this cause be, and hereby are affirmed, with costs in favor of the appellees and against the appellants.

It is further ordered, adjudged and decreed by this Court, that the appellees recover against the appellants for their costs herein expended, and have execution therefor.

(August 5, 1935)

You, Therefore, Are Hereby Commanded, That such execution and further proceedings be had in the said cause as according to right and justice and the laws of the United States ought to be had, the said appeal notwithstanding.

Witness, the Honorable Charles E. Hughes, Chief Justice of the United States, the 18th day of No-

vember, in the year of our Lord One Thousand Nine Hundred and thirty-five.

PAUL P. O'BRIEN

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

Amount of Costs Allowed and Taxed

In favor of appellees and Against appellant as
per Annexed Bill of Items, taxed in Detail: \$20.00.

PAUL P. O'BRIEN

Clerk [36]

BILL OF ITEMS ANNEXED TO MANDATE PURSUANT TO SECTION 5, RULE 31

Item No.	Debit Items	Dr.	Cr.
1	Docketing the Case and Filing the Record	5.00	
2	Entering 3 Appearances.....	.75	
3	Entering Continuances		
4	Entering 3 Orders.....	.60	
5	Filing 37 Papers.....	9.25	
6	Filing 20 copies of printed record	5.00	
7	Filing Briefs for Each Party Ap- pearing 3	15.00	
8	Filing		
9			
10			
11	Transferring Cause on Printed Calendar (2)	2.00	
12	Drawing, Filing and Recording Decree or Judgment	1.65	
13			
14	Filing Petition for a Rehearing....	5.00	
15			
16	Issuing Certified Record on Cer- tiorari Petition	30.60	

Bill of Items Annexed to Mandate Pursuant to
Section 5, Rule 31—(Continued)

Item No.	Debit Items	Dr.	Cr.
17	Telegram from Clerk US SC.....	2.71	
18			
19	Issuing Mandate, \$5.00; costs and Copy \$40	5.00	
20			
21	Total, Miscellaneous Costs	82.96	
22	Expense, Printing Record, R. 23:	324.09	
23	Expense, Printing Proceed CCA	46.04	
24	Total of Debit Items.....	453.09	
	Credit Items		
1	Deposit Rule 17 Moore & Shim- mel		35.00
2	Additional Deposits Moore & Shimmel (JAMoore).....		75.16
3			
4			
5	Expense Printing Record, R. 23: M & S.....		324.09
6	Expense Printing Proceedings, C.C.A. M.&S		46.04
7	Total of Credit Items		480.29
8	Balance refund (Moore & Shim- mel)		27.20
	Totals.....	453.09	453.09

Itemized Bill of Costs Allowed and Taxes

Amount

1	Certified Cost of Transcript from Court Below	
2		
3	Deposits Account Misc. Costs.....	
4	Total Expense, Printing Record.....	
5	Expense Printing Proceedings, C.C.A.....	
6		

Bill of Items Annexed to Mandate Pursuant to
Section 5, Rule 31—(Continued)

Item No.	Debit Items	Dr.	Cr.
7	Attorney's Docket Fee.....		20.00
8	Balance Costs		

Total (Inserted in Body of Mandate)

Taxed at 20.00

Attest:

PAUL P. O'BRIEN

Clerk of the United States Cir-
cuit Court of Appeals for
the Ninth Circuit.

[Endorsed]: Filed Dec 2 1935. J. Lee Baker,
Clerk, United States District Court for the District
of Arizona. By Jerome L. Buchanan, Deputy Clerk.

[37]

PETITIONER MONAGHAN'S EXHIBIT B

In the District Court of the United States for the
Federal District of Arizona.

No. E-268—Phoenix

GUADALUPE R. GALLEGOS, FRANCESCA
GALLEGOS, his wife, INGA G. GUDMUND-
SEN AND MATA E. DEXTER, in their own
behalf and in behalf of others similarly situ-
ated,

Plaintiffs,

vs.

INTERMOUNTAIN BUILDING & LOAN AS-
SOCIATION,

Defendant.

PETITION OF ELIZABETH G. MONAGHAN
FOR ALLOWANCE OF ATTORNEYS'
FEES FOR LEGAL SERVICES REN-
DERED AND EXPENSES INCURRED
AND EXPENSES FOR WHICH THE AT-
TORNEYS BECAME OBLIGATED, IN
THE PREPARATION AND TRIAL OF
THE ABOVE ENTITLED SUIT.

Comes now Elizabeth G. Monaghan, and respect-
fully presents to this court her petition for allow-
ance of attorneys' fees for legal services rendered
and expenses incurred and expenses for which the
attorneys became obligated, in the preparation and
trial of the above entitled suit, wherein petitioner
was employed to represent the plaintiffs and others

Petitioner Monaghan's Exhibit B (Cont.)

similarly situated, not specifically named as plaintiffs therein but who were represented by the plaintiffs named and who accepted and participated in the benefits resulting therefrom; 2,792 of them having elected to accept the benefits of petitioner's efforts in the premises, such benefits consisting in the recovery for their benefit of a trust fund of more than two million dollars, namely \$2,119,662.82, which would otherwise have been dissipated and totally lost to them; and in support of this petition alleges the following:

I.

PETITIONER'S PROFESSIONAL
EXPERIENCE.

Petitioner has been since 1923, and now is, a member of the [38] Bar of the Supreme Court of Arizona and of the United States District Court for the Federal District of Arizona, and has been at all times since said date in active practice before the state Courts of Arizona and the Federal Courts of the District of Arizona.

Petitioner is now and has been for many years a member of the State Bar of California and of the United States Circuit Court of Appeals for the Ninth Circuit.

II.

PETITIONER'S EMPLOYMENT.

During the first part of the year 1932 petitioner was employed by lienholding creditors of the Inter-

Petitioner Monaghan's Exhibit B (Cont.)

mountain Building & Loan Association, the defendant above named, and spent a number of months in investigating the affairs of said defendant, as well as filing a suit in the state court, as hereinafter set forth. On March 3, 1933, petitioner was authorized by the above named plaintiffs by written instruments to bring such actions or suits as she might deem proper and advisable as against the Intermountain Building & Loan Association, an Utah corporation, and to take such action as she might deem necessary for the appointment of a receiver for said corporation, and to associate any other attorney with her, should she deem it advisable.

ASSOCIATE COUNSEL.

Following the institution of said suit on April 18, 1933, your petitioner associated Joseph M. Nealon, an attorney at law of El Paso, Texas, as counsel for the purpose of the hearing on May 8, 1933, of the motion to dismiss filed by the defendants, and following the filing of the amended complaint on June 23, 1933, your petitioner associated with her, Hon. Thomas W. Nealon, an attorney at law, of Phoenix, Arizona, to assist her in such litigation. That said Thomas W. Nealon was an outstanding member of the bar of the state of Arizona, and a large portion of his practice in Arizona since 1914, has been on the equity side of the Federal Court.

Petitioner Monaghan's Exhibit B (Cont.)

III.

Immediately upon being employed in the first part of 1932, as aforesaid, your petitioner began an investigation of the affairs of said corporation, searching all available sources of information to ascertain the financial condition of said corporation, the nature and extent of its assets and liabilities, the conduct of its officers and directors, as well as a study of the law applicable to the existing situation.

IV.

In the course of this investigation, your petitioner discovered that the business of the defendant corporation was being conducted in a manner contrary to law, extravagantly, wastefully, and in a manner that would ultimately result in the waste and dissipation of all of the assets of the corporation, and that the corporation had been insolvent from about the year 1922, if not before that date, and that it was not a true building and loan association but a fraudulent corporation.

V.

RESULTS OBTAINED FOR BENEFIT
OF CREDITORS.

As a result of the investigation made by your petitioner, which is outlined more fully hereinafter, your petitioner, on April 18, 1933, instituted the above suit, and filed an amended complaint in June, 1933. Following the filing of the amended complaint, your petitioner, with the assistance of said Thomas

Petitioner Monaghan's Exhibit B (Cont.)

W. Nealon, represented said creditors in all proceedings until final judgment, although those in control of the corporation opposed relief for plaintiffs and those similarly situated all the way to the Supreme Court of the United States. Your petitioner, and her co-solicitor, were successful in every step, notwithstanding the great hazard of success, owing to the difficulty of procuring evidence, the novel questions involved, and the brilliant array of attorneys retained to oppose your petitioner and [40] her co-solicitor, all of which is more fully set forth hereinafter.

The success of your petitioner and her co-solicitor in this litigation resulted in saving to the creditors of the Association, assets of a value of \$2,119,-662.82, the following being a summary of the assets of said defendant corporation now in the actual or constructive possession of the receiver of said corporation:

The Arizona assets, as per inventory of
April 1, 1937, have a value as per the
books of the corporation and receiver of \$1,597,841.89

The assets in other states, as shown in inventories of November 30, 1935, and April
1, 1937, amount to..... 1,135,229.34

Total..... 2,733,071.23

Less allowance for loss on realization:

On Arizona assets.....\$248,228.54

On assets in other states..... 365,179.87

Total allowance for loss on realization as
per report of H. S. McCluskey..... 613,408.41

Realization value of all assets.....\$2,119,662.82

Petitioner Monaghan's Exhibit B (Cont.)

In addition thereto, choses in action against M. E. Waddoups and other directors of the defendant corporation, from which should be realized \$100,000.00; and against the bonding company bonding the officers and directors, in the sum of \$50,000.00.

That 2,792 of the creditors of said corporation elected to avail themselves of the benefit of the decree obtained through the efforts of solicitors for plaintiffs.

VI.

Petitioner, and her co-solicitor, found upon their investigation, that some 3,840 were creditors of said Association; the bulk of these creditors being people of limited means, among them widows, orphans, guardians and old people, endeavoring to safely invest \$5.50 per month and thus in the course of ten and one-half years accumulate \$1,000.00; they possessed but limited business experience which was not sufficient to enable them to analyze the complicated corporate structure of the defendant [41] corporation and they were influenced in making their investments by plausible propaganda presented by the corporation through newspaper articles, circulars and printed matter, as well as by high-pressure salesmen. And in the contract itself, it was specifically provided that the corporation should hold in trust for each of the plaintiffs and those similarly situated, real estate mortgages in the amount of 100% of the amount due to each of them, and that these securities in the trust fund should be subject to the constant inspection of the banking officials

Petitioner Monaghan's Exhibit B (Cont.)
of Utah or of the state in which the creditor resided.

CONTRACT TRUST PROVISION.

The contract contained the following provision:

"PRIVILEGES AND CONDITIONS.

Security. As security for the performance of the obligations of the Association hereunder, the Association will hold intact, subject to the constant examination and inspection of the banking department of the State of Utah, first mortgages on improved Real Estate in an amount equal to at least one hundred percent of its liabilities hereunder, less the amount of any loans made on this and like certificates or any certificates issued in lieu thereof."

VII.

DISCLOSURES OBTAINED BY INVESTIGATION.

Investigation disclosed many wrongful acts committed by the defendant corporation resulting in the waste and dissipation of its assets and of the trust funds entrusted to it, and which caused the insolvency of the defendant corporation, some of which were as follows:

Petitioner Monaghan's Exhibit B (Cont.)

UNLAWFUL EXPENDITURES.

During a period of 3½ years there had been unlawfully paid to one M. E. Waddoups, as commissions on the sale of securities of the Intermountain Building & Loan Association (in many instances he receiving all that was paid in to the corporation by the lender, the sum of \$ 482,886.00

Dividends had been paid to said Waddoups and his [42] associates, that were never earned by the corporation and which were wrongfully paid from the trust fund belonging to the plaintiffs and others similarly situated, amounting to 418,649.50

That loans had been improvidently made, a large percentage of which were made in violation of the Articles of Incorporation and By-Laws of the Association, resulting in a loss of..... 765,182.78

The total loss on these three items alone being..... \$1,666,718.28

In addition to the above your petitioner and her co-solicitor found that an exorbitant and fictitious salary, the amount being impossible to estimate, was being paid to said Waddoups as president of the defendant corporation, and had been during a long period of time upon a basis of \$24,000.00 per year, approximately 45% of which came from the trust fund belonging to the plaintiffs and those similarly situated, and which were paid in violation of the Articles of Incorporation and By-laws of the Association, while said Waddoups devoted only a part of his time to the business of the Intermountain Building & Loan Association.

Petitioner Monaghan's Exhibit B (Cont.)

WRONGFUL MANAGEMENT.

Petitioner, and her co-solicitor, found that said M. E. Waddoups had dominated and controlled said corporation absolutely from the time of its organization in Utah in 1921, until his stock therein was purchased by one Daniel Alexander, in, to-wit: October of 1924, and that upon losing control of said corporation, he moved from Salt Lake City, Utah, to Phoenix, Arizona, where he organized the First National Building and Loan Association, and through said latter corporation again obtained control of the defendant corporation in, to-wit: August 1930, and that at all times subsequent to that date up to the time of the appointment of the receiver herein by this Court he retained such control and manipulated its affairs for the benefit of himself and to [43] *and to* the injury of the plaintiffs and those similarly situated.

WILFUL AND NEGLIGENT CONDUCT.

Said Waddoups was using the funds of the Association to finance the operations of the Lincoln Mortgage Company, a company largely owned and absolutely dominated by him, and the defendant corporation suffered extreme losses through the manipulation of loans made upon buildings erected by said Lincoln Mortgage Company.

Prior to the organization of the defendant corporation, said Waddoups had entered into a secret contract with one Daniel Alexander, in which it was agreed

Petitioner Monaghan's Exhibit B (Cont.)

that said Alexander should be elected President of the defendant corporation, and that Waddoups should not be an officer, but should receive a large commission upon all contracts issued by the corporation of similar tenor to those held by plaintiffs, and that they were to divide these profits derived from this transaction. Later Alexander sued Waddoups for his portion under such agreement but Waddoups settled said suit before it came to trial.

Losses of an extremely large amonut, the actual figures of which cannot be obtained, were suffered by the corporation through the negligence of its officers and directors in permitting taxes to accumulate on property on which they held mortgages, (some as long as ten years) and in some cases the total of the delinquent taxes amounted to more than the value of the property. As a result of this negligence many properties were lost through tax sales, and other properties necessarily had to be abandoned. Nor did these officers and directors of the corporation take any steps in court necessary to secure the payment of such taxes from the rental value of the properties.

In the year 1931 alone, unlawful dividends paid to the president of the Association and his associates amounted to some \$119,312.68. During the same period, expenses, salaries, costs [44] of collection and other items ran the expense up to \$218,718.79; a sum greater than could have been collected from the interest of all of the mortgages held by the corporation and the rents from all the properties owned

Petitioner Monaghan's Exhibit B (Cont.)

by the corporation. The losses of the corporation during that period alone was probably in excess of \$240,000.00.

The Association had paid large sums of money to withdrawing certificate holders while it was insolvent, with the result that some of such holders had been paid in full while the plaintiffs and those similarly situated would receive under any circumstances only a portion of the money due them.

The Association had been transferring and was continuing to transfer many of its assets to other corporations.

The Association was not functioning for the purpose for which it was incorporated, was doing practically no new business or any profitable business and had lost the confidence of the public to such an extent that it could never be profitably conducted, and had lost all right to do any business in Arizona.

VIII.

INSOLVENCY.

The investigation disclosed that the conduct of the officers and directors of the defendant corporation had been such that at the time your petitioner filed suit herein, she alleged that the liabilities of the corporation exceeded the assets of said corporation by more than \$400,000.00 (the liability was later found to be in excess of \$700,000.00) and that the corporation was hopelessly insolvent and had been so since 1922. Its paid-in capital never exceeded \$3,460.00, and this was exhausted before

Petitioner Monaghan's Exhibit B (Cont.)
1922, and from that time on it operated on money borrowed from its creditors.

IX.

CONCEALMENT OF TRUE STATE OF AFFAIRS.

The true state of affairs of the corporation was concealed [45] from the creditors and the public by the fact that the total liabilities on obligations like those held by the plaintiffs and those similarly situated, never appeared upon the books of the company, and further by the fact that thousands of these obligations had been written off on the records of the corporation as if they had been forfeited, there being no authority of law whatsoever permitting the corporation and its officers so to do. As a result thereof, there were hundreds of the creditors of said association who were entitled to participate in this trust fund, whose rights had been totally lost. A large portion of the funds so "forfeited" was absorbed by said Waddoups and his associates through a particular form of stock called "expense fund stock", although said funds belonged in a trust fund for the purpose of protecting those who had furnished money to buy the securities.

X.

FUNDS WRONGFULLY SENT OUT OF STATE.

The officers and directors of the corporation also sent large sums of money out of the state for the

Petitioner Monaghan's Exhibit B (Cont.)

purpose of giving a preference to residents of other states in the matter of the payment of claims similar to those of the plaintiffs herein and those similarly situated. Among these sums so taken, \$40,000.00 was sent to California in 1929, and \$50,000.00 in 1932, which sums were invested in securities that are now held in California. (suit is now pending to recover the same for the benefit of the plaintiffs and those similarly situated and is being conducted for and on their behalf, the present receiver of the corporation also being a party thereto). There was also a similar attempt to give a preference to residents of Oregon and Wyoming,—all in violation of the rights conferred upon the plaintiffs and those similarly situated.

XI.

FRAUDULENT ADVERTISING [46]

The officers and directors of the defendant corporation also published in newspapers and circulars, false reports that the defendant corporation and five other building and loan associations, known as the Intermountain Building and Loan Group, dominated by said M. E. Waddoups, had a capital and surplus in excess of \$8,000,000.00, at a time when each of these associations was insolvent and when approximately 45% of this amount represented liabilities of the defendant corporation, these reports being made with the intent of securing further contributions from persons situated as were the plaintiffs in this suit, and inducing the public to invest its

Petitioner Monaghan's Exhibit B (Cont.)
money with the defendant by such false representations.

XII.

FAILURE OF UTAH BANK COMMISSIONER TO ACT.

The defendant corporation was charged by law with the duty of filing reports showing its financial condition, with the Banking Department of the State of Utah, and did make such purported reports each year for the years 1921 to and including 1932. Although the contracts issued to the plaintiffs and those similarly situated provided that the funds of said association should be invested in first mortgages on improved real estate in an amount equal to at least 100% of its liabilities therein, and that the mortgages should be at all times subject to the constant examination and inspection of the Banking Department of Utah, and although the Banking Department of Utah was empowered to make complete examinations of the affairs of said defendant corporation, and did make numerous investigations thereof, and although by these reports and these examinations the said Bank Commissioner was fully informed, or by reasonable diligence could have been informed of the unsafe and unsound condition of said defendant corporation and the misconduct of its officers in declaring dividends from trust funds, and other misconduct and neglect of its [47] officers, and the insolvency of the corporation during all of the period from 1922 to 1932, the Bank Commissioner

Petitioner Monaghan's Exhibit B (Cont.) of Utah, with all this information before him, and with all these resources at his command, failed, refused and neglected to take any steps for the protection of these plaintiffs and those similarly situated.

XIII.

THREATENED REMOVAL OF ALL ASSETS.

Petitioner during the course of her investigation of the affairs of the defendant corporation in the year 1932, received information from reliable sources that the corporation was planning to remove all of its personal property, including promissory notes and mortgages, and its books and records, out of the state of Arizona, and out of the jurisdiction of the courts of Arizona, so as to render it practically impossible for its creditors to protect their rights and which would force them to a foreign jurisdiction in search of redress, which redress could only have been secured at a prohibitive cost, and then only by actions similar to that taken by your petitioner. Petitioner was also informed that the corporation had made settlements with the plaintiffs in the suits pending at that time in the state court so that the court would release the assets of the Intermountain Building & Loan Association from its control in order that these assets could be removed from the state of Arizona.

XIV.

In order to prevent such removal of the assets of the defendant corporation from the jurisdiction of

Petitioner Monaghan's Exhibit B (Cont.)

the courts of Arizona, your petitioner, on June 23, 1932, by telegram from Chicago, Illinois, where she was on said date, authorized Thomas W. Nealon, her co-solicitor in this suit, to institute suit in the name of her clients, and on the 27th day of June, 1932, the said Thomas W. Nealon, jointly with petitioner, instituted such proceedings in the Superior Court of Arizona, in and for the County of Maricopa, [48] as resulted in the prevention of the removal of the personal property of the defendant corporation from Arizona, and thus preserved for the benefit of the plaintiff herein and those similarly situated, such assets and records which would otherwise have been lost.

In these proceedings in the state court, your petitioner and her associate counsel, were opposed by many eminent members of the Arizona Bar, including Messrs. John L. Gust, Charles B. Ward, Alexander B. Baker, Louis B. Whitney and L. L. Howe.

XV.

It was obvious from the investigations made by your petitioner, that if a court of equity did not restrain the waste, mismanagement, misapplication of funds and the dissipation of the assets of the defendant corporation, all of the assets would be dissipated in a short time, and every investor in this Association would lose every dollar they had put in, and the only way this could be prevented was for this Court to take constructive possession of such assets and appoint some reliable person of its own selection to husband

Petitioner Monaghan's Exhibit B (Cont.)

the dwindling assets of the corporation for the benefit of the creditors of the association, and on the 18th day of April, 1933, your petitioner personally, filed in said United States District Court for the District of Arizona, a suit in equity for the purpose of recovering the trust fund herein described and conserving the assets of said corporation, of having a receiver appointed for that purpose, and of obtaining a restraining order and injunction to prevent the disposition or removal of such assets pending suit. An amended petition was filed by your petitioner on June 23, 1933.

XVI.

CLASS SUIT.

The plaintiffs above named were among the lienholding creditors who employed your petitioner to institute suit, and said suit was filed in behalf of said creditors and all others similarly [49] situated, the persons so situated being too numerous to be made parties to the suit, the bill of complaint containing the following paragraph:

“That the plaintiffs bring this action on behalf of themselves and for all others similarly situated who desire to come in and bear their proportion of the expense of this suit; that the persons so situated are too numerous to be made parties to this action.”

The instant suit was not filed until the insolvency of the corporation and the misconduct of its officers had become widely known, as well as the waste of its

Petitioner Monaghan's Exhibit B (Cont.)

assets, and not until it became widely known that the First National Building & Loan Association, which held the corporate control of the defendant corporation and dominated its affairs, was insolvent, and said suit was not filed until it was apparent to anyone who examined into the affairs of the defendant corporation that it was the only method available of preventing the further dissipation of the assets, misapplication of funds and waste of the fast dwindling remnant of such assets.

XVII.

2,792 CREDITORS AVAIL THEMSELVES OF
BENEFITS SECURED.

2,792 creditors of the said defendant corporation elected to accept the above offer and thereby obligated themselves to pay your petitioner a reasonable fee for the services rendered to them by her in said suit to the same extent as if they had signed a written contract to that effect before suit was brought.

XVIII.

LEGAL PROBLEMS AND INVESTIGATION
THEREOF.

Your petitioner personally made an intensive study of the law applicable to the facts ascertained by her investigation, and based her complaint upon the theory that the plaintiffs and all those similarly situated were entitled to equitable [50] relief, and prayed for such relief on the following theory:

Petitioner Monaghan's Exhibit B (Cont.)

A federal court has equitable jurisdiction to entertain a class suit when the requisite diversity of citizenship exists and when one of the complainants is a creditor holding a claim in excess of \$3000.00, secured by an equitable lien. No state can by statute or otherwise deprive a federal court of its jurisdiction or limit that jurisdiction in any particular.

The contracts entered into between the defendant corporation and the plaintiffs and those similarly situated, created equitable liens in favor of the latter and created the relation of debtor and creditor between the parties to such contracts. A federal court of equity at the instance of lienholding creditors has jurisdiction to appoint a receiver for the assets of a building and loan association, incorporated in a state other than that in which the court is sitting, when the jurisdictional facts exist and justify the granting of equitable relief, and as an incident thereto the appointment of a receiver when the association is doing business in the state where the court is sitting.

Equal protection of the law is granted to each and every creditor of a corporation regardless of his residence or citizenship, and no state can by statute give a preference to its own citizens or residents over those of any other state.

When a federal court of equity obtains jurisdiction over a corporation by means of a sufficient bill of complaint and personal service on the corporation, or its authorized agents, such court has the power to compel such corporation to execute deeds and other conveyances to real or personal property in the states

Petitioner Monaghan's Exhibit B (Cont.)

where the property is situated when the property involved is trust property and the conduct of the corporate trustee has been such as to justify its removal and the appointment of a receiver to take possession of its assets.

The police powers of a state do not extend beyond its physical boundaries and state officers as such cannot exercise any of their [51] delegated powers outside of such state except that, where the statutes of that state vest title to the assets of a delinquent corporation in such officer and proper steps have been taken to wind up the affairs of such delinquent corporation, the statutory receiver may be vested with title to the property actually owned by the corporation wherever situated.

The articles of incorporation of the defendant corporation and the statutes of Utah vested said defendant corporation with the power to borrow money and pledge its property to secure the payment of its obligations. The statutes of Utah did not vest its bank commissioner with title to the assets of a defunct building and loan association.

The defendant corporation was insolvent and its liabilities exceeded its assets by more than \$400,000.00 (later found to be much greater). Its affairs had been mismanaged by its officers and directors who had wasted its assets for eleven years; had paid dividends amounting to hundreds of thousands of dollars to themselves when the corporation was insolvent, the payments being made from funds rightfully belonging to the complainants and those similarly

Petitioner Monaghan's Exhibit B (Cont.)

situated. Its expenses exceeded its earnings in 1932 by more than \$70,000.00. It paid extravagant salaries for nominal services. Its liabilities were falsely stated on its books. It made false statements in its published statements and advertisements in order to obtain money from complainants and those similarly situated. All of its properties were being wasted to such an extent that there would be no funds left to pay anything to complainants and those similarly situated and their claims would be a total loss unless this Court took complete charge of its affairs and salvaged the same for the benefit of its creditors.

With records in his office revealing this state of the corporation's affairs, the Bank Commissioner of Utah permitted the [52] officers and directors of the corporation to mismanage the affairs of the corporation, waste and absorb its assets, misapply its trust funds, obtain fresh loans from the public by false representations as to its financial condition, and took no steps to correct this condition, and although the Bank Commissioner of Utah had accepted the trust to constantly inspect the trust fund which the corporation had agreed to set aside for the protection of the complainants and those similarly situated, he never at any time or at all took steps to protect such fund or the persons who were being defrauded.

The state officers of California, Oregon, Idaho and Wyoming were guilty of a like dereliction of duty in permitting such trust funds to be misapplied and wasted and dissipated, although they made repeated

Petitioner Monaghan's Exhibit B (Cont.)
examinations of the affairs of the corporation, which, if properly conducted, would have revealed the truth.

An imperative necessity existed for the appointment of a receiver if the complainants and those similarly situated were to recover a single dollar of the money they had loaned to the corporation on the faith of their contracts by which the corporation had agreed to hold these assets in trust subject to the constant examination and inspection of the banking department of the state of Utah to secure such loans, and that no other adequate remedy existed for the protection of these creditors and those similarly situated other than the one pursued in this proceeding.

XIX.

Process was duly issued in said suit and service had upon the defendant, and a restraining order was immediately issued against the defendant restraining the defendant from disposing of the assets of the defendant corporation and from removing, destroying or concealing its books, records, files, documents and other property of the defendant then in the state of Arizona. [53]

XX.

DEFENDANT'S RESISTANCE—ITS THEORIES.

The defendant corporation vigorously resisted the suit of the plaintiffs herein, employing Messrs. Charles B. Ward, R. G. Langmade, Charles L. Rawlins and George H. Rawlins, all outstanding members

Petitioner Monaghan's Exhibit B (Cont.)

of the bar of this court, as their solicitors to defend said suit.

These solicitors filed various dilatory motions in which they sought to have the restraining order modified and vacated and attacked the complaint, particularly upon the ground of lack of jurisdiction of this Court and upon the ground of failure to state sufficient facts to entitle the complainants to any relief.

These solicitors were well versed in federal equity practice and ably presented the contentions of the defendant corporation. They denied the right of this Court to give the necessary protection to these plaintiffs and those similarly situated, not only upon the facts of the case but upon the law as well, and further contended:

That this court had no jurisdiction to appoint a receiver for this corporation; the sole right to liquidate the assets of the corporation was in the Bank Commissioner of the State of Utah, the corporation having been organized under the laws of that state; the appointment of a receiver would be an abuse of discretion by the court and would result in the acceleration of the due date of all mortgages held by it and would thus work a great injustice to the mortgagors; the facts alleged in the bill of complaint did not justify the issuance of a restraining order or an injunction, or the appointment of a receiver; the plaintiffs were not creditors but stockholders; the plaintiffs' contracts did not create a lien in their favor, that plaintiffs were not entitled to withdraw funds or demand the payment of their certificates, basing this

Petitioner Monaghan's Exhibit B (Cont.)

contention on the ground that [54] they had failed and neglected to carry out their contracts with the defendant and that the defendant had kept and performed its contracts with the plaintiffs according to the conditions therein and the by-laws of the Association, which the defendant corporation alleged specifically provided that not more than one-half of the fund received by the association in any one month should be applicable to the payment of withdrawing members and that withdrawals should be paid in rotation according to priority of notice, and that there were other stockholders of the association who had applied prior in time to the filing of the applications of plaintiffs who had not been paid in rotation or whose turn for payment had not been reached for the reason that sufficient funds of the association had not been received applicable to the payment of claims of withdrawing members, and contended further that under the laws of Utah, not more than one-half of the monthly receipts in any one month might be applied to the withdrawals for the month without the consent of the board of directors of the corporation.

The defendant corporation also denied insolvency, mismanagement, waste of assets, and the other material allegations of the complaint.

They supported their contentions by briefs and oral argument of able counsel for defendant.

Petitioner Monaghan's Exhibit B (Cont.)

XXI.

PLAINTIFFS' REPLY TO DEFENDANT'S
CONTENTIONS.

Your petitioner and her co-solicitor met the contentions of the defendant by extensive briefs and oral arguments, contending that:

The court had jurisdiction to appoint a receiver of a foreign corporation at the instance of creditors, where fraud and insolvency were involved; the Bank Commissioner of Utah was appointed under the police power of that state and the police power [55] did not extend beyond the territorial jurisdiction of that state.

That the mortgages held by the corporation were straight mortgages and which provided a definite term of payment and were not mortgages of such a character whose due date would be accelerated by the failure of the corporation; the facts alleged, namely insolvency, mismanagement and dissipation of the assets, were sufficient grounds for the relief sought and were fully supported by affidavits of petitioner and James A. Smith, C.P.A., filed in this proceeding.

The plaintiffs were not stockholders but creditors; the contracts created equitable liens and a trust of which the federal courts of equity could and would take jurisdiction; under defendant's construction of the contracts, the obligations to plaintiffs and those similarly situated would never be payable and that such construction would be a fraud upon such creditors.

Petitioner Monaghan's Exhibit B (Cont.)

That the bill of complaint, verified by your petitioner, showing insolvency, and the affidavits of your petitioner and the said James A. Smith, C.P.A. in support thereof, made a prima facie case which could only be refuted by a showing of solvency, the production of the books and records of the corporation and a complete disclosure of the truth of its condition in the pleadings of the defendant corporation.

XXII.

COMMISSIONER MALIA'S ATTEMPTED
INTERVENTION.

After various oral arguments and the filing of briefs going to the question of law raised by the motions and demurrers of the defendant, and while the court had the same under consideration, but before the Court had given its decision in the matter, J. A. Malia, then Bank Commissioner of the State of Utah, did, on the 26th day of September, 1933, file a petition for leave to intervene in this proceedings for the purpose of having the books, records and movable assets of the corporation removed to [56] the state of Utah, upon the alleged ground that he could have closer supervision over the affairs of the corporation, he alleging in his motion or petition for leave to intervene, that the defendant corporation had since 1921 conducted a successful building and loan business. This allegation was made notwithstanding the fact that he then had in his possession full information in the records of his office of the insolvency of the corporation and mismanagement of its affairs, and

Petitioner Monaghan's Exhibit B (Cont.)

notwithstanding the fact that he had notice for months previously of the filing of this suit and of the filing of the affidavits in connection therewith which directly called to his attention the true condition of the defendant corporation.

He further alleged that the corporation being an Utah corporation, he was vested with exclusive jurisdiction over the affairs of the defendant to the exclusion of this or any other court, and prayed for an order of this court permitting him to file his complaint in intervention and to be forthwith entered as intervenor in said action, and for other and further general relief. The purpose of said intervention was to divest this Court of all control of the assets of the defendant corporation which were then in the constructive possession of this Court, and to remove such assets beyond the jurisdiction of this Court.

Said petition was verified by D. M. Draper, a member of the Bar of the State of Utah, and an assistant attorney general of that state, and he represented said Malia as Bank Commissioner in presenting said petition to the Court.

XXIII.

PLAINTIFFS' SOLICITORS OPPOSE MALIA
AND ARE SUSTAINED.

Upon the presentation of the petition of said Malia, your petitioner and her co-solicitor, strongly opposed the same and alleged that there had been no compliance with the federal equity [57] rules governing

Petitioner Monaghan's Exhibit B (Cont.)
intervention, and, among other points, alleging that the jurisdiction of the court in the premises had not been admitted as required by such rule. The Court sustained the position of your petitioner and her co-solicitor, and refused to recognize the intervention by Malia. Thereupon an application was made to the Court to allow Mr. Draper to appear as counsel pro hac vice for the defendant corporation and he then associated himself with the other counsel representing the defendant corporation as one of counsel for the defendant resisting the complaint of the plaintiffs herein. Mr. Draper argued strongly and ably against the right of the court to appoint a receiver, as against the wishes of the Bank Commissioner of Utah. The Court granted Mr. Draper further time to amend his petition or show any right to intervene in the proceedings.

After the hearing on September 26, 1933, to-wit: on October 3, 1933, the solicitors for the plaintiffs filed formal written motions to dismiss the petition of Malia for leave to intervene, supported by points and authorities, and duly served the same upon him, as well as upon the defendant. The Bank Commissioner of Utah did not avail himself of the opportunity granted him by the Court to amend his petition to intervene and on the 3rd day of January, 1934, his petition was dismissed.

XXIV.

After due consideration by the Court on the various briefs and oral arguments made, the Court denied

Petitioner Monaghan's Exhibit B (Cont.)
defendant's motions and overruled their demurrers, thus settling all the law questions. The cause then awaited the convenience of the Court for the purpose of setting a date for the hearing of the cause.

XXV.

SEIZURE OF ASSETS BY MALIA.

This was the situation that existed a few days prior to the 17th day of March, 1934, when the said J. A. Malia, with the con- [58] sent and acquiescence of M. E. Waddoups, took possession of the assets of the defendant corporation in Arizona (which were then in the physical possession of the corporation), notwithstanding the constructive possession of said assets in this Court. A. J. Bruneau, secretary and general-manager of the defendant corporation, protested the seizure of these assets without this Court's consent, but without avail.

Malia also attempted to secure possession of the moneys of the corporation deposited in the Valley National Bank of Phoenix, and the Phoenix National Bank, but each of these institutions refused to turn over possession of such funds to him. Following this refusal, Malia then appeared in the United States District Court and filed an amended petition for leave to intervene, as Bank Commissioner of the state of Utah, on March 23, 1934, seeking to procure an order from this Court disclaiming any right to appoint a receiver or take possession of the assets of the defendant and sought an order that would destroy the force

Petitioner Monaghan's Exhibit B (Cont.) and effect of the restraining order issued by the Court on April 18, 1933, which was still in effect. He was represented at this time by Messrs. Moore & Shimmel, eminent attorneys of Phoenix.

XXVI.

MALIA'S ALLEGATIONS.

Malia based his right to intervene upon the allegation that he had theretofore, on, to-wit: March 17, 1934, seized the assets of the defendant corporation in Utah and that he had prior to the time of the filing of said petition procured an order from the state district court in Utah authorizing him to take possession of all of the assets of the corporation, and that he claimed title to the assets upon the theory that he was so vested by the terms of the Utah statutes.

XXVII.

PLAINTIFFS' SOLICITORS AGAIN OPPOSE MALIA. [59]

The solicitors for plaintiffs vigorously opposed the contention of the Bank Commissioner of Utah and filed a petition for the immediate appointment of a receiver and procured an order to show cause thereon. They alleged that said Malia had failed, neglected and refused theretofore to take action to protect the investors in said Association, although he was fully informed, or by reasonable diligence could have been informed, of the unsafe and unsound condition of the defendant corporation, and that with all this in-

Petitioner Monaghan's Exhibit B (Cont.)

formation before him, he did on the 26th day of September, 1933, assert in a written pleading filed in this court that the defendant corporation "since 1921 has conducted a successful building and loan business throughout the several states of the Union under the supervision of the Bank Commissioner of the state of Utah", and your petitioner and her co-solicitor also alleged that from the records and files in the cause it appeared that the Bank Commissioner of the State of Utah had been negligent in his supervision of the affairs of the corporation, lacked the qualities necessary to a proper administration of its affairs and had for a long period of time suffered said corporation to continue business in an unsafe and unsound condition when he had access to their records and could have by the use of ordinary diligence discovered the condition of its affairs.

The defendant corporation and Malia filed answer and objections to this petition of plaintiffs for the immediate appointment of a receiver, and strenuously fought the granting of the petition in the premises. In these proceedings Malia was further represented by two members of the Bar of Salt Lake City Messrs. H. Van Dam and H. L. Mulliner, in addition to said Messrs. Moore & Shimmel.

XXVIII.

PETITION OF PLAINTIFFS GRANTED. [60]

These issues were heard by the Court on the 10th day of April, 1934, at which time evidence was intro-

Petitioner Monaghan's Exhibit B (Cont.)
duced and exhaustive arguments made, and from the bench the Court made the following order:

"I will enter an order of record in this case at this time directing Mr. Malia to leave all the papers and files and the property of the Building and Loan Association in the state of Arizona and not remove them. That goes to all assets, books, records, files, money and everything else that belongs to this association; that they do not be removed from this state. That order is in effect until this matter is disposed of or until further order of the Court."

The cause was ordered submitted on briefs, and your petitioner and her co-solicitor were directed to prepare a brief upon the particular point involved as to the rights of the Bank Commissioner of Utah in the premises. This was the first occasion in the history of law, so far as your petitioner is informed, in which the question of the unfitness of a state official to administer the assets of a delinquent corporation had been raised as a ground for the appointment of a receiver, and proved an important question in the subsequent conduct of the litigation.

On the 20th day of April, 1934, the Court granted the petition of the plaintiffs for the appointment of a receiver pendente lite, appointing Hon. Henry S. McCluskey as such receiver and continued in force the injunction and restraining order theretofore entered by it. The Receiver qualified on the date of his appointment and demanded possession of the assets, but his demand was refused.

Petitioner Monaghan's Exhibit B (Cont.)

XXIX.

DEFENDANT CORPORATION AND MALIA
APPEAL TO CIRCUIT COURT OF APPEALS.

That immediately upon the entering of the interlocutory decree appointing Henry S. McCluskey, Receiver, notice of appeal was given by the defendant corporation and J. A. Malia, Bank Commissioner of Utah. This appeal was granted by the court and supersedeas bond fixed in the sum of \$35,000.00. James R. [61] Moore, solicitor for the proposed appellants, together with your petitioner's co-solicitor, then appeared before the Honorable Fred C. Jacobs, the Judge who tried the cause, and settled the statement of evidence and the appeal was duly perfected.

XXX.

PROCEEDINGS ON APPEAL.

In June of 1934, and before the case was at issue in the Circuit Court of Appeals, the defendant corporation filed a motion for modification of the injunctive order made by this Court, and also filed a brief therewith. This was opposed by your petitioner and her co-solicitor, who filed an answer and brief thereto. The Circuit Court of Appeals denied this motion of the defendant corporation.

The appellants filed their brief on appeal in due season contending that the appellees were stockholders (the certificates labeled them as such); that the bill of complaint was without equity; that the court abused its discretion in appointing a receiver; that

Petitioner Monaghan's Exhibit B (Cont.)

the appellees had no lien upon the assets of the corporation; that the Bank Commissioner of Utah was the statutory liquidator and vested with title to the Association's assets, and that under the full faith and credit clause of the Constitution, the court was bound to recognize the title of the Bank Commissioner of Utah to the assets of the corporation; that the court will not appoint a receiver at the suit of an unsecured, nonjudgment creditor, and that the court should not interfere with the internal affairs of a foreign corporation.

Your petitioner and her co-solicitor filed their answering brief thereto within the time required by law, contending:

That the labeling of the certificate as stock did not make it such, and the instrument itself created the relation of debtor and creditor between the contracting parties; that the facts stated in the complaint showed appellees' right to equitable [62] relief and that they were holding equitable liens and that the defendant was false to its trust; that the facts presented to the court by the verified petition of plaintiff, and otherwise, were such as to require it to grant the injunctive relief and appoint a receiver; that the contracts between appellants and appellees created equitable liens in favor of appellees and the assets of the corporation were a trust fund to secure the repayment of the money borrowed from the appellees and those similarly situated; that the Bank Commissioner of Utah was not vested with title to the assets of the corporation; that the appointment

Petitioner Monaghan's Exhibit B (Cont.)

of a receiver is an ancillary remedy which a federal court of equity will grant to a lienholding creditor in a proper case; that the appellees and those similarly situated being creditors and not stockholders, the issue was not one of internal management but the right of creditors to prevent the waste of a trust fund; that Malia had no rights in the premises, but if ever he had any he had lost same by his negligence and failure to protect the rights of all lienholding creditors, he having ample information in his own office of the wrongful conduct of the defendant corporation and its insolvency.

While this matter was at issue in the Circuit Court of Appeals the Supreme Court of the United States on the 4th day of February, 1935, handed down four decisions involving the rights of statutory liquidators, and the appellants thereupon filed a supplemental brief in the Circuit Court of Appeals based on the theory that these decisions required a reversal of the decree rendered in the District Court. In opposition to this contention your petitioner and her co-solicitor filed their supplemental brief.

XXXI.

CIRCUIT COURT OF APPEALS SUSTAINS
PETITIONER.

The cause was argued at San Francisco on the 28th day of [63] February, 1935, by petitioner's co-solicitor; your petitioner being present in court and assisting on that occasion.

Petitioner Monaghan's Exhibit B (Cont.)

The matter was taken under advisement, and on the 5th day of August, 1935, the Circuit Court of Appeals rendered its decision in which it affirmed the interlocutory decree of the United States District Court appointing Henry S. McCluskey as receiver and issuing an injunction pertaining to the assets of the corporation, and in its opinion the Circuit Court of Appeals said the Court below "might well have arrived at the conclusion that the corporate chaos had been a matter of years, rather than months, and that therefore the Bank Commissioner of Utah in whose office admittedly there were filed reports containing 'full information as to the status of the defendant corporation', had shown himself not to be a proper person to husband the dwindling assets of the failing Association."

The appellants thereupon filed a motion for the purpose of having certain papers in the District Court sent up to the Circuit Court of Appeals, which motion was opposed by your petitioner and her co-solicitor, and the certiorari therefor was subsequently denied.

XXXII.

PLAINTIFFS' SOLICITORS SUSTAINED IN
UNITED STATE SUPREME COURT.

The appellants then filed their motion for rehearing and this was also denied, and they thereupon filed their petition for a writ of certiorari in the Supreme Court of the United States and their briefs thereon, in which they made the contentions that the

Petitioner Monaghan's Exhibit B (Cont.)

Circuit Court of Appeals had denied full faith and credit to the statutes of Utah and decided a federal question in conflict with the decision of the United States Supreme Court in the case of *Clark v. Willard*, 292 U.S. 112 and 294 U.S. 211; and that in affirming the decision of the District Court appoint-[64] ing a receiver and displacing the Bank Commissioner of Utah, its decision was contrary to the four decisions hereinbefore mentioned which involved the rights of statutory liquidators and which had been rendered while this case was at issue in the Circuit Court of Appeals.

Your petitioner and her co-solicitor filed their opposing brief, contending that the decision of the Circuit Court of Appeals was not in conflict with the cases cited; that no public question or other question of public importance which had not theretofore been settled by the Supreme Court was involved, and that there was no departure from the accepted and usual course of judicial proceedings in the court's decree.

The petition for a writ of certiorari was denied by the United States Supreme Court on November 11, 1935.

XXXIII.

TRIAL AND FINAL DECREE.

On the 29th day of September, 1936, the suit was tried upon the merits, your petitioner and her co-solicitor appearing for the plaintiffs, and James R. Moore, Esq., of the law firm of Moore & Shimmel appearing for the defendant, and after hearing the

Petitioner Monaghan's Exhibit B (Cont.)
evidence the Court directed that findings of fact and conclusions of law be prepared by counsel for plaintiffs and that decree be entered for the plaintiffs.

On, to-wit: the 5th day of January, 1937, the District Court for the District of Arizona made its decree in which it, among other things, established the liens of the creditors, affirmed the appointment of Henry S. McCluskey as receiver, and made the injunction theretofore rendered, permanent; thereby establishing the rights of said lienholding creditors who desired to come in and obtain the benefits of the judgment upon the conditions named in the invitation contained in the complaint, namely, that they should bear their proportionate share of the [65] expense of the litigation, which included the attorneys' fees herein petitioned for.

Further, said decree secured the trust fund wherever situated to the plaintiffs in this suit and those similarly situated, said decree providing and ordering that deeds and other conveyances to the property of the corporation wherever situated should be executed by the corporation to the receiver as trustee for the benefit of all these parties, said decree having been obtained after personal service and appearance by the corporation; this provision was made for the reason that a receiver appointed by an United States court is not vested with title, but such court has power to compel the defendant to execute deeds and conveyances to its property wherever situated when the same is trust property. Such decree is binding upon all situated similarly to the named plaintiffs, regardless of any active participation in the suit.

Petitioner Monaghan's Exhibit B (Cont.)

XXXIV.

INTERVENTION.

In accordance with the invitation contained in the complaint, other creditors similarly situated to plaintiffs in this action employed their own attorneys, and Messrs. O'Sullivan and Morgan, of Prescott, Arizona, filed a motion for leave to intervene in these proceedings as plaintiffs. The court granted this leave to intervene, solicitors for plaintiffs acquiescing in the granting of the motion to intervene. However, they never filed a complaint in the proceedings or took other action therein.

H. C. Smoot and Sophia Smoot, through their solicitor E. O. Phlegar, filed a motion for leave to intervene, solicitors for plaintiffs acquiescing therein. Their motion was granted and bill of complaint was filed therein by Mr. Phlegar on behalf of his clients. He appeared in subsequent proceedings up to the termination thereof in the United States District Court, but [66] subsequently withdrew and took no part in the appeal or the proceedings in the United State Supreme Court.

XXXV.

LABOR INVOLVED—OBSTACLES
INTERPOSED.

Practically all of the detail work incident to the litigation herein described and the other proceedings in connection with the recovery and preservation of the trust funds herein mentioned, were performed by

Petitioner Monaghan's Exhibit B (Cont.)

this petitioner, as well as a large part of the investigations and research work necessary to the successful conduct of such litigation.

The labor of your petitioner was arduous and difficult, the results of the litigation by no means certain, and the hazard of success great.

Your petitioner and her co-solicitor had great difficulty in procuring the evidence to establish the facts for the reason that the books and records were in the exclusive possession of the officers, directors and employees of the defendant corporation, who, as well as their attorneys, refused access thereto to your petitioner and her co-solicitor, and were hostile to plaintiffs. It thus became necessary for your petitioner and her co-solicitor to obtain their information from indirect sources.

Petitioner personally made examinations of the records in the state of Arizona, of the Arizona Corporation Commission; of the Superintendent of Banks; of the State Treasurer, of the County Recorder and of the County Treasurer and County Assessor, to ascertain so far as possible all matters pertaining to the affairs of the association; petitioner personally checked all records of the association in the offices of the County Recorder and County Clerk and of the Bank Commissioner, in Salt Lake City, Utah, and of the suit instituted by J. A. Malia in the District Court of Sale Lake County, seeking the liquidation and suspension of the association in Utah.

Petitioner Monaghan's Exhibit B (Cont.)

Petitioner personally made investigation into the records [67] of the state courts in foreclosure proceedings and other litigation in which the defendant corporation was involved. Petitioner had interviews with other attorneys who had claims against the defendant and allied corporations, and many interviews and consultations with her clients; that she procured newspaper and advertising matter and printed statements of the corporation as far as they could be obtained by diligent search.

Your petitioner personally attended the trials in the Superior Court in and for the County of Maricopa, in actions brought against the First National Building & Loan Association, which held the corporate control of the defendant herein, and against the Intermountain Building & Loan Association of Arizona, both corporations belonging to the so-called Intermountain Group. Many admissions were made by the defendants in these two mentioned suits, and valuable information was secured by your petitioner and these hearings assisted her in obtaining the evidence necessary to establish the allegations of the plaintiff's complaint in this suit. These trials each lasted several weeks, and receivers were appointed.

Your petitioner and her co-solicitor had interviews with representatives of the federal government who had come to the office of petitioner's co-solicitor in search of evidence against said M. E. Waddoups, and who in turn furnished your petitioner and her co-solicitor with valuable information.

Your petitioner sought the services of her sister,

Petitioner Monaghan's Exhibit B (Cont.)

Kathleen E. Nelligan, of Salt Lake City, Utah, to obtain from the office of the Bank Commissioner of the State of Utah, copies of all reports filed by the defendant corporation annually from the year 1921 up to and including the last report filed, which was for the year 1932. The said Kathleen E. Nelligan, together with one Gertrude Casto, proceeded to and did obtain all of said copies for petitioner, and both the said Kathleen E. Nelligan and Gertrude Casto made affidavit as to the correctness of said copies. The defendant [68] corporation later by affidavit admitted that such copies were true and correct copies of the reports filed by it. After consultations with petitioner's co-solicitor and with James A. Smith, a certified public accountant, of Phoenix, Arizona, as hereinafter more fully set forth, and after a thorough personal examination of said reports, your petitioner broke down and analyzed said reports for the purpose of obtaining the evidence therefrom to establish the insolvency of the corporation material to the controversy, and to establish the fraud and mismanagement of its directors, as well as the negligence of the Bank Commissioner of Utah in permitting the corporation to do business when by the reports on file in his office and an examination of the affairs of the corporation, he knew, or could have known, by the use of ordinary diligence, the insolvency of said corporation; that from said analysis and break-down of said reports, petitioner personally prepared a schedule showing the insolvency of said corporation year by year, and provided

Petitioner Monaghan's Exhibit B (Cont.)

proof of the insolvency of the defendant corporation and the misconduct of its officers, and, as stated by petitioner's co-solicitor in his petition, was a "time consuming and laborious process." Petitioner spent many, many weeks on this schedule alone. After your petitioner had prepared this schedule, it was checked by said James A. Smith, C.P.A. as aforesaid, and found to be correct. The affidavits of Elizabeth G. Monaghan and James A. Smith, attached to the bill of complaint, were based on this schedule made by petitioner.

Petitioner's brother-in-law, S. A. Nelligan, of Salt Lake City, Utah, obtained for petitioner and her co-solicitor, the records of the suit filed by Daniel Alexander against M. E. Waddoups, hereinbefore mentioned, in which was disclosed the secret contract under which the unlawful commissioners of the amount of several hundred thousand dollars had been unlawfully paid to the said M. E. Waddoups.

[69]

Petitioner personally attended the taking of the depositions of M. E. Waddoups and A. J. Bruneau, the examinations being conducted by Hon. Joseph H. Morgan, of the law firm of O'Sullivan and Morgan, Prescott, Arizona, attorneys for the plaintiffs in the suit against the First National Building and Loan Association, hereinabove referred to. In said depositions admissions were made of the excessive commissions paid to said M. E. Waddoups and others, ranging from three to seven per cent.

Petitioner personally secured an affidavit from one

Petitioner Monaghan's Exhibit B (Cont.)

George Field, a former salesman for said association, showing the commission paid to agents selling the certificates of the association.

Petitioner sought and secured information from each and every county in the states of Arizona and Utah, pertaining to the property of the association.

Petitioner and her co-solicitor made examinations of the statutes of Utah, and such examinations disclosed that corporations similar in nature to the defendant were required to file verified annual statements with the Bank Commissioner of the State of Utah and that it was the duty of the Bank Commissioner of Utah to make periodical examinations of the affairs of such corporations.

Your petitioner, her co-solicitor and said James A. Smith, were of the opinion that the defendant could not file such reports for a period of eleven years without revealing the true condition of the corporation, and that a break-down of such reports would necessarily reveal, when taken in connection with other evidence existing and available, that the corporation was and had been insolvent for years; that its expenses had exceeded its income for many years and that these statements would reveal the misconduct of the officers and directors of the defendant, as well as the mismanagement of its affairs and waste of its assets. [70]

The very nature of this suit of necessity required the assistance of an expert accountant, and your petitioner was fortunate in obtaining the assistance of James A. Smith, a certified public accountant of

Petitioner Monaghan's Exhibit B (Cont.)

Phoenix, Arizona, and member of the W. H. Plunkett Audit Company, who was familiar with accounting in all its branches, including building and loan associations.

The work performed and advice given by Mr. Smith was invaluable to petitioner and her co-solicitor. In consideration of the services to be rendered by the said James A. Smith, your petitioner agreed that if she were successful in this suit, she would petition the Honorable Court for a reasonable compensation to him.

The said James A. Smith has submitted to your petitioner a memorandum of the work which he performed, together with a statement of what he believes to be reasonable compensation therefor, which memorandum is attached hereto as Exhibit "A", hereby referred to and made a part hereof. Petitioner believes that the sum of \$10,000.00 is a reasonable sum to be allowed said accountant.

The contracts between the defendant corporation and its creditors, when examined by your petitioner, her co-solicitor and James A. Smith, disclosed that the corporation was promising to pay such creditors interest at the rate of 8.84% per annum. The commissions of from three to seven percent paid to said Waddoups and others, for obtaining the funds represented by these contracts, ran the total cost of the money borrowed to the sum of \$67.40 per year, for an average of five years, for each \$663.00 received by said association, or a fraction more than 10%. Since the evidence disclosed that the bulk of the

Petitioner Monaghan's Exhibit B (Cont.)

loans made by the association to certificate holders and others, in Arizona at least, returned to the association only 8% interest, the result was that the total income from the association's loans was not [71] sufficient to pay the interest which it had guaranteed to the creditors, and in addition to this deficit, there was no income with which to pay expenses of doing business, and the corporation was becoming further insolvent each year to the full extent of the expenses incurred by it, plus its losses on investments.

In order to prove these facts it was necessary not only to have the records mentioned from the office of the Bank Commissioner of Utah, together with the supporting affidavits, but also the outside evidence and affidavits showing the excess cost.

As a result of the consultations with and the work of said James A. Smith, and the analysis and breakdown of such reports by your petitioner, in connection with other evidence assembled by the solicitors for the plaintiffs, sufficient evidence was procured to establish a *prima facie* case to obtain the relief prayed for in petitioner's bill of complaint.

As the facts involved were many and not susceptible of proof by "demonstrable evidence" this case comes within the definition of hazardous cases (upon the facts), as the rule is set forth in the case of *United States vs. Equitable Trust Co.*, 283 U.S. 738; 75 L. ed. 1379.

Petitioner Monaghan's Exhibit B (Cont.)

XXXVI.

NOVEL LAW QUESTIONS INVOLVED.

By reason of the fact that many novel questions of law were involved, it was necessary for your petitioner and her co-solicitor to make an exhaustive study of the applicable principles of the law and of the authorities which would sustain those principles upon a hearing in court to prove to the court the right of the plaintiffs to the relief they sought.

It was also necessary to make an exhaustive study of the statutes of Utah to ascertain whether there was anything in those statutes, which as a matter of public policy of that state [72] would render contracts of the nature of plaintiffs' and those similarly situated, void in so far as they attempted to create a lien, and this investigation enabled your petitioner and her co-solicitor to establish to the satisfaction of the various courts the validity of these liens.

Much study was necessary also to an interpretation of the statute laws of California, Oregon, Idaho and Wyoming, in which states this corporation was doing business.

Novel and difficult questions of law were involved in this litigation, questions that had not been definitely determined until the decision of the Supreme Court in this case, and properly to present these questions and overcome the contentions of the defendant corporation in opposition thereto necessitated an immense amount of research work. The applicable principles of law had not at the time your

Petitioner Monaghan's Exhibit B (Cont.)
petitioner filed the complaint herein, been determined by the Supreme Court of the United States nor by any of the federal courts of appeal and were therefore uncertain.

The contention of your petitioner and her co-solicitor that the United States Court had a right to appoint a receiver of a building and loan association where the statutes at the domicile of the corporation provided for liquidation by a state officer, when the state official had shown himself unfit to administer the affairs of the delinquent corporation and when the statutes under which he was appointed were inadequate to give this protection to litigants, was a question raised for the first time in the annals of the law so far as your petitioner is aware, and was upheld by the Circuit Court of Appeals, and, also, for the first time, that right was definitely settled and that principle established by the denial of the writ of certiorari by the Supreme Court of the United States.

The contention of your petitioner and her co-solicitor that [73] the relation of debtor and creditor was created by the particular contracts and that a trust and lien was created as against the building and loan association on behalf of the holders of the certificates, also raised for the first time, was established definitely, and in its decision the Circuit Court of Appeals definitely held that despite the label attached to the certificates, the instruments were not stock, but created the relation of debtor and creditor, and that the language of the contract was sufficient

Petitioner Monaghan's Exhibit B (Cont.)

to create an equitable lien in favor of such creditor; this also being established for the first time.

Although prior to this time it had been established that a building and loan association could borrow money and issue its promise to pay in the form of investment certificates, it had not been held that a building and loan association could pledge or mortgage its assets for the purpose of securing loans so obtained, until the final decision in this case.

Another novel question involved the force and effect of a statute of the state under which a corporation was organized when that state permitted a building and loan association to remove its principal office to another state and to carry on its business in the foreign jurisdiction.

In the course of her research work, your petitioner examined and analyzed more than a thousand cases bearing on the various issues involved, as well as the statutes of the various states and many text books. This extensive research was necessary by reason of the numerous questions of law involved. This case therefore comes within the definition of a hazardous case in regard to the law as set forth in *U.S. vs. Equitable Trust Co. supra*.

XXXVII.

PETITIONER'S WORK.

The major portion of the time of your petitioner for a period of more than three and one-half years was devoted to labor [74] for and on behalf of the

Petitioner Monaghan's Exhibit B (Cont.)

plaintiffs and those similarly situated in the investigation of this cause, the study of the principles of law governing the case, the analysis of the facts involved and the establishing of evidence to support the allegations of the complaint, the assisting in the preparation of all pleadings and briefs in the case, as well as the editing, revising and correcting of all such pleadings and briefs, obtaining the various orders and decrees in this suit, defending the decree of the lower court in the Circuit Court of Appeals and the Supreme Court of the United States, the preparation as to the law and facts necessary to a successful conclusion of the case, as well as the time spent in preparation, research work, examinations of the records in the offices of the Arizona Corporation Commission, the Superintendent of Banks, the State Treasurer, the County Recorder, the County Treasurer, County Assessor and the office of the Clerk of the Court of Maricopa County; the trip to Salt Lake City, Utah, for the purpose of examining the records pertaining to the corporation in the offices of the County Recorder, the County Clerk, the Bank Commissioner of Utah, and the Clerk of the District Court; the attendance at the taking of the depositions of M. E. Waddoups and A. J. Bruneau; the attendance at the trials in the Superior Court in and for the County of Maricopa; attendance at all hearings involving this suit before the United States District Court, as shown by the records, and the Circuit Court of Appeals at San Francisco, California; examination of the statutes of other states,

Petitioner Monaghan's Exhibit B (Cont.)

conference with attorneys for the defendant and the Bank Commissioner of Utah, conferences with attorneys representing particular creditors, including attorneys for the intervenors; conferences and consultations with the plaintiffs, and other clients of petitioner holding claims against the defendant, and various creditors of the defendant corporation; consultations and conferences too [75] numerous to count, with petitioner's co-solicitor and with James A. Smith, C.P.A. That not only did your petitioner give her time and labor during the days, but also the majority of the evenings, Sundays and holidays, during the entire three and one-half year period.

Petitioner states that the necessary work personally performed by her consumed conservatively not less than two and one-half years of continuous legal work.

XXXVIII.

ASSETS RECOVERED FOR BENEFIT
OF CREDITORS.

On to-wit, the 30th day of November, 1935, Rulon F. Starley, who had succeeded J. A. Malia as Bank Commissioner of Utah, turned over to Henry S. McCluskey, Receiver appointed by this court as aforesaid, the physical possession of the assets in Arizona, as well as the books and records of the corporation in Arizona. These assets amounted to the gross sum of \$1,597,841.89, and are now in possession of Harry W. Hill, Esq., who succeeded Mr. McCluskey as receiver on April 1, 1937.

Petitioner Monaghan's Exhibit B (Cont.)

The Receiver having been primarily appointed by this Court, and decree having been obtained requiring the conveyance of title, such decree would have to be recognized in other states where the defendant had property. As a result thereof, this suit established the rights of these creditors in the property wherever situated and is *res adjudicata* of all questions involved in the proceedings, and is binding on all those similarly situated to the plaintiffs in this suit, regardless of whether they became active participants in the litigation in this court.

By the decree of this Court it was established that the Receiver appointed by this court was the owner, as trustee, for the benefit of the creditors of said defendant corporation, of gross assets of the defendant corporation in states other than Arizona, of \$1,135,229.34. [76]

Subsequent to the 30th day of November, 1935, physical possession of the assets of the defendant in the states of Utah, Idaho and Wyoming were delivered to ancillary receivers appointed in aid of the primary receivership in this Court, and are now being so administered. The rights of the plaintiffs and those similarly situated established by the decree of this court, has not yet been recognized by officials in the states of California and Oregon.

The total gross assets thus passing into the hands of the receiver as trustee for the plaintiffs and those similarly situated is \$2,733,071.23.

In addition, there are choses in action against

Petitioner Monaghan's Exhibit B (Cont.)

said M. E. Waddoups and other directors and officers of the defendant corporation from which should be realized a further sum of, to-wit: \$100,000.00, your petitioner and her co-solicitor having laid the foundation for this suit.

Your petitioner and her co-solicitor also laid the foundation for the suit against the Bonding Company bonding the officers for unlawful conduct of the officers and directors of said corporation, there having been a fidelity bond issued for that purpose, the liability of said bond exceeding the sum of \$50,000.00.

The solicitors for the plaintiffs also laid the foundation for a suit against Waddoups for the sequestration of his property, which suit is now pending in the Superior Court of Arizona, in and for the County of Maricopa, and your petitioner and her co-solicitor also laid the foundation for a judgment subsequently obtained against M. E. Waddoups and others and by which there was secured a lien upon certain of properties held by him in the state of Arizona.

Had it not been for the services rendered by your petitioner and her co-solicitor, all of the assets of the defendant corporation would have been dissipated by the defendant corporation, [77] its officers and directors, as shown by the record in this suit.

Petitioner Monaghan's Exhibit B (Cont.)

XXXIX.

NO COMPENSATION RECEIVED BY
PETITIONER.

No contract or understanding now exists or was ever made or existed between your petitioner and the plaintiffs or others similarly situated for compensation for her services, other than the agreement that in the event of a successful termination of the litigation she would accept a reasonable compensation to be allowed by the Court, the same to be paid from the assets coming into the hands of the receiver of the defendant corporation, should a receiver be appointed by this Court.

When petitioner associated with her the said Thomas W. Nealon to assist her in this litigation, it was agreed that whatever allowance was received as compensation would be divided equally between the petitioner and her co-solicitor, the said Thomas W. Nealon.

The prevailing rates of compensation in this community to attorneys in cases where the fees are contingent on recovery range from twenty to thirty-five percent of recovery, depending on difficulty of proof and hazard involved. Such is the rate of compensation these 2792 creditors who accepted the benefits of said decree would probably have had to pay had they contracted individually for such services as were rendered by the solicitors for the plaintiffs in this cause.

No application has heretofore been made by

Petitioner Monaghan's Exhibit B (Cont.)

your petitioner for compensation for the services rendered to the plaintiffs or those similarly situated for the bringing of suit, or for the services rendered by your petitioner as described in this petition.

XL.

EXPENSES INCURRED

All of the preliminary expenses incurred in the investigation, preparation and trial of said suit up to the time of the [78] appointment of the receiver, and expenses incurred subsequent thereto, with the exception of the printing of the briefs, the expenses for stenographic services set up by petitioner's co-solicitor and his trip to San Francisco, as well as sundry expenses borne by petitioner's co-solicitor subsequent to the appointment of the receiver in the sum of \$26.82, was borne by your petitioner either directly or by reimbursement to her co-solicitor. In the petition of your petitioner's co-solicitor he has itemized various expenses and asks to be reimbursed. Among said items of expenses were listed those paid by this petitioner or for which she had reimbursed her co-solicitor, and she believes that her co-solicitor will reimburse her for the amount of the expenses so borne by her, and petitioner will not again set up said items.

In addition to the above, the following expenses were incurred by your petitioner, totaling the sum of \$301.65, for which she seeks reimbursement:

Petitioner Monaghan's Exhibit B (Cont.)	
Travel, hotel, meals, etc. trips Prescott to Phoenix and return.....	\$175.00
Railroad fare and expenses to Salt Lake	67.20
Railroad fare and expenses to San Francisco	59.45
<hr/>	
Total.....	\$301.65

Wherefore, your petitioner prays that this Honorable Court allow to your petitioner and her co-solicitor a just and reasonable compensation for their services rendered in connection with the preparation, institution and trial of said cause, including the services rendered by them on the appeal from the interlocutory decree rendered herein to the Ninth Circuit Court of Appeals and for their services in opposing the petition of the defendant corporation and J. A. Malia to the Supreme Court of the United States for a writ of certiorari to review the proceedings in the District Court and Circuit Court of Appeals, [79] such allowance to be for all legal services rendered by the solicitors for the plaintiffs in the premises.

Your petitioner further prays that she be allowed the additional sum of \$401.65, for expenses necessarily incurred by her in the premises as hereinbefore set forth.

Your petitioner further prays that she be allowed the additional sum of \$10,000.00, or such other sum as the court may deem just and rea-

Petitioner Monaghan's Exhibit B (Cont.)

sonable, for the expense for which she and her co-solicitor necessarily became obligated to the said James A. Smith, C.P.A.

Your petitioner further prays that this Court establish and fix a lien upon the assets now in the hands of the Receiver of the Intermountain Building and Loan Association, an Utah corporation, for the just and reasonable allowance to your petitioner and her co-solicitor upon the foregoing petition and the petition of petitioner's co-solicitor heretofore filed, for services rendered and expenses incurred and expenses for which they became obligated and further prays that said Receiver be authorized and directed to pay the amount of such allowance to your petitioner and her co-solicitor, and to pay the expenses, as aforesaid, from the funds of the receivership estate now in his possession, and that each of the 2792 creditors of said Association who have elected to accept the benefits of the efforts of petitioner and her co-solicitor bear their proportion of such allowance and expenses.

ELIZABETH G. MONAGHAN¹

Petitioner [80]

State of Arizona,
County of Yavapai—ss.

Elizabeth G. Monaghan, being first duly sworn on oath, deposes and says: That she is the petitioner above named; that she has read the fore-

Petitioner Monaghan's Exhibit B (Cont.)
going petition, knows the contents thereof, and
that the same is true, in substance and in fact.

ELIZABETH G. MONAGHAN

Subscribed and Sworn to before me this 15th
day of November, 1937.

[Seal]

BETTY JANE McDONNELL

Notary Public

My commission expires: October 31, 1939. [81]

Willis H. Plunkett

Members of

C.P.A. Arizona 1919

American Institute of

James A. Smith

Accountants

C.P.A. Arizona 1927

American Society of C.P.A.

Arizona Society of Public

Accountants

The W. H. Plunkett Audit Co.

Analytical & Constructive Accounting

Six Hundred Twelve Luhrs Tower

Phoenix, Arizona

November 12, 1937.

EXHIBIT "A"

To:

Elizabeth G. Monaghan

and

Thomas W. Nealon

Attorneys

Luhrs Tower

Phoenix, Arizona.

Petitioner Monaghan's Exhibit B (Cont.)

Memorandum in Re:

Intermountain Building & Loan Association
of Utah

Original Suit.

This resume of services is presented with relation to the original suit against the above corporation for the recovery of assets on behalf of creditors.

I was first employed by you, entering immediately upon the necessary work involved, in the early part of 1932. Thereafter, the services performed followed the requirements of the case, often consisting of several consecutive days' work and at other times being of such terms as were necessary.

The full facilities of my office, including the use by you of many texts and treatises on the accounting matters involved, were placed at your disposal.

The work involved and the extent of the service rendered is, of course, familiar to you; but as a means of supplying you with the information so that you may present it for consideration in making your prayer for compensation allowance, it is herein briefly outlined as follows:

1. From the inception of the case, conferences were held frequently, sometimes lasting a few minutes and from that, running into several hours. Much of the time spent in conference was on nights and Sundays.

Petitioner Monaghan's Exhibit B (Cont.)

2. A large volume of accounting work was performed in preparing analyses of financial statements filed by the Association from 1920 to 1932 inclusive; preparation of tables of possible earnings for the period; checking of details with comparisons of financial statements by periods for the purpose of showing insolvency; preparation of insolvency data to show both the period and extent of such insolvency; setting up of proper actuarial tables for certi- [82] (a) ficate values to show the difference between stated values and actuarial increase in value for the purpose of explaining interest rate as cost of money to Association; compilation of statistics taken from various reports of the Association; compilation to show fraudulent manipulation of expense and income accounts; and various other presentations of accounting data pertaining to the case.

3. All hearings in State Courts, whether in relation to one or all of the various associations known as the Intermountain Group, were attended. This was done for the purpose of ascertaining and tabulating information which might be brought out in testimony which might in any way have a bearing upon the instant case. The attendance at court involved many days of work and study which were followed by conferences for the purpose of searching out salient points of interest or attack.

4. Preparation of affidavits as to solvency.

5. Reading of transcripts of testimony adduced at the various hearings of this particular case as

Petitioner Monaghan's Exhibit B (Cont.)

well as those of the other Intermountain cases.

6. Attendance at all hearings and at the trial of the present case. At these times I was always present at your counsel table for the purpose of assisting you in the presentation of evidence and in the cross-examination of adverse witnesses.

7. Presentation of my testimony in the trial whereby the results of the long months of our efforts were crystalized by the statement to the Court conveying my conclusions and findings of fact.

8. Assisting you in your briefing of the case by reading and study of the points stressed and by breaking down the testimony of adverse witnesses to show the vulnerable parts which, in my opinion, strengthened our case when given proper emphasis in your briefs.

All of this varied service and assistance consumed large [83] (b) amounts of time at varying seasons and over a period of many months.

Each accounting phase accomplished, new fields presented themselves and these in turn were made subjects of further endeavor. Progress was necessarily slow since we often lacked much of the picture which could only be filled in by the use of judgment and conclusion until the correct premise was obtained.

Great patience and diligence was required and the hazard of being unable to arrive at a sound conclusion was ever present, thus rendering my task more difficult.

Other accountants, many persons of vast expe-

Petitioner Monaghan's Exhibit B (Cont.)

rience and intimate knowledge of the Association affairs, were arrayed against us. Their testimony was bolstered one by the other, whereas my evidence and testimony was to all intents and purposes the key to the entire evidential side of our case.

A brilliant array of adverse counsel fought savagely every statement I made and took every opportunity to berate and harass me, even questioning my knowledge, ability and integrity before the Court, until the Court acknowledged the attack by referring to the cognizance the Court had taken of my work before him on many occasions theretofore.

In a case of this nature, as in all equity cases where an accounting is requisite, the work of the accountant is inseparably linked to that of the attorneys, and the fruits of victory are, in part, his to be enjoyed.

The value of the work I performed must lie in the success which was achieved by us acting together. The reliance placed upon my efforts was readily shown by the language of the Circuit Court when that Court placed emphasis upon the affidavit of mine and the testimony thereafter adduced.

This work was all performed upon a contingent basis. The possibility of losing the case was taken into consideration [84] (c) from the beginning. It was my understanding that if the case were successful you would make application to the Court

Petitioner Monaghan's Exhibit B (Cont.)

for a reasonable compensation for my services, and that otherwise, in the event the suit were lost, I would receive nothing.

Because of the great amount of actual time spent in the physical labor of preparation, my labor as an expert has a real and tangible value. The period of time that has elapsed without recompense has naturally weighed somewhat heavily upon me. The hazard of success, the extreme contingency of the outcome of the case, the mental strain of hours on the witness stand, no less than the success of the effort, has made these services so unstintingly rendered to you, worthy of a just and valuable compensation.

Inasmuch as the suit was successfully prosecuted and the decision was favorably rendered, the conditions under which my service was performed have been fulfilled and I am, therefore, asking that you make your petition to the Court for an allowance for the services rendered.

Upon the foregoing statements and the conditions of our agreement, I herewith submit a statement for my services which I value conservatively at Ten Thousand (\$10,000.00) Dollars.

Respectfully,

(Signed) JAMES A. SMITH

Certified Public Accountant,
Member of the W. H. Plunkett Audit Company. [85] (d)

Petitioner Monaghan's Exhibit B (Cont.)

To

E. G. Monaghan and Thomas W. Nealon,
Attorneys, in the matter of

The Intermountain Building & Loan Association
of Utah.

In Account with

James A. Smith, Certified Public Accountant,

For services rendered in the original suit to re-
cover.

\$10,000.00 [86] (e)

INDEX

	Paragraph	Page
Petitioner's Professional Experience.....	I	1-2
Petitioner's Employment	II	2
Associate Counsel		2
Investigation of Facts.....	III	3
Condition of Defendant Corporation.....	IV	3
Results Obtained for Benefit of Creditors..	V	3-4
Creditors of the Corporation.....	VI	4-5
Contract Trust Provision.....		5
Disclosures Obtained by Investigation.....	VII	5
Unlawful Expenditures		5-6
Wrongful Management		6-7
Wilful and Negligent Conduct.....		7-8
Insolvency	VIII	8
Concealment of True State of Affairs.....	IX	8-9
Funds Wrongfully Sent Out of State.....	X	9
Fraudulent Advertising	XI	9-10
Failure of Bank Commissioner to Act.....	VII	10-11
Threatened Removal of Assets.....	XIII	11
Litigation in State Court.....	XIV	11-12
Necessity for Equitable Relief.....	XV	12
Class Suit	XVI	12-13
2,792 Creditors Avail Themselves of Bene- fits Secured by Solicitors.....	XVII	13
Legal Problems and Investigation Thereof	XVIII	13-16
Restraining Order Issued.....	XIX	16

Petitioner Monaghan's Exhibit B (Cont.)

Index—(Continued)

	Paragraph	Page
Defendant's Resistance—Its Theories.....	XX	17-18
Plaintiffs' Reply to Defendant's Contentions	XXI	18-19
Commissioner Malia's Attempted Intervention	XXII	19-20
Plaintiffs' Solicitors Oppose Malia and Are Sustained	XXIII	20-21
Law Questions Decided.....	XXIV	21
Seizure of Assets by Malia.....	XXV	21-22
Malia's Allegations	XXVI	22
Plaintiffs' Solicitors Again Oppose Malia....	XXVII	22-23
Petition of Plaintiffs Granted.....	XXVIII	23-24
Defendant Corporation and Malia Appeal to Circuit Court of Appeals.....	XXIX	24-25
Proceedings on Appeal.....	XXX	25-26
Circuit Court of Appeals Sustains Petitioner	XXXI	26-27
Plaintiffs' Solicitors Sustained in United States Supreme Court.....	XXXII	27-28
Trial and Final Decree.....	XXXIII	28-29
Intervention	XXXIV	29-30
Labor Involved—Obstacles Interposed	XXXV	30-35
Novel Law Questions Involved.....	XXXVI	35-37
Petitioner's Work	XXXVII	37-39
Assets Recovered for Benefit of Creditors..	XXXVIII	39-41
No Compensation Received by Petitioner....	XXXIX	41
Expenses Incurred by Petitioner.....	XL	41-42
Prayer		42-43

Petitioner Monaghan's Exhibit B (Cont.)

Index—(Continued)

	Paragraph	Page
Verification		44
James A. Smith, C.P.A.		
Memorandum and Statement.....	Exhibit "A"	a-e [87]

[Endorsed]: Filed Nov 22 1937. Edward W. Scruggs, Clerk, United States District Court for the District of Arizona. By Helen Roach, Deputy Clerk.

[Endorsed]: Petr Monaghan's Exhibit No. B. Admitted and Filed Dec 20 1937. Edward W. Scruggs, Clerk, United States District Court for the District of Arizona. By Wm. H. Loveless, Chief Deputy Clerk. Case No. E-268 Phx. Gallegos vs. Intermountain. [88]

PETITIONER NEALON'S EXHIBIT No. 3

[Title of District Court and Cause.]

PETITION OF THOMAS W. NEALON FOR
ALLOWANCE OF ATTORNEY'S FEES
FOR LEGAL SERVICES RENDERED AND
EXPENSES INCURRED IN THE PREP-
ARATION AND TRIAL OF THE ABOVE
ENTITLED SUIT

Comes Now Thomas W. Nealon and respectfully presents to this Court his petition for an allowance of attorney's fees for legal services rendered by him and expenses incurred by him in the preparation and trial of the above entitled suit, wherein

Petitioner Nealon's Exhibit No. 3—(Continued)
he was employed to represent the plaintiffs and others similarly situated, not specifically named as plaintiffs therein but who were represented by the plaintiffs named and who accepted and participated in the benefits resulting therefrom, 2,792 of them having elected to accept the benefits of his efforts in the premises, such benefits consisting in the recovery for their benefit of a trust fund of more than two million dollars, namely \$2,119,-662.82, which would otherwise have been dissipated and totally lost to them; and in support of this petition alleges the following: [89]

I.

PETITIONER'S PROFESSIONAL EXPERIENCE

That he has been since 1914 and now is a member of the Bar of the Supreme Court of Arizona and of the United States District Court in and for the Federal District of Arizona, and has been at all times since said date in active practice before the state courts of Arizona and the Federal Courts of the District of Arizona;

That he is and has been for many years an active member of the State Bar of California and that of the United States Circuit Court of Appeals for the Ninth Circuit.

That during all of said period a large portion of his practice has been upon the equity side of the Federal Court.

Petitioner Nealon's Exhibit No. 3—(Continued)

II.

PETITIONER'S EMPLOYMENT

That many months prior to April 18, 1933, he was employed by certain lienholding creditors of the Intermountain Building & Loan Association, the defendant above named, to file suits against said corporation and establish equitable liens by court decree to recover trust property from the delinquent corporation and procure the appointment of a receiver to preserve and conserve the assets of said corporation then being wasted and dissipated by the said corporation, its officers and directors.

III.

INVESTIGATION OF THE FACTS

That immediately upon being employed as aforesaid, your petitioner began an investigation of the affairs of said corporation, searching all available sources of information to ascertain the financial condition of said corporation, the nature and extent of its assets and liabilities, the conduct of its officers and directors, as well as a study of the law applicable to the existing situation. [90]

IV.

CONDITION OF DEFENDANT CORPORATION

That in the course of this investigation, your petitioner discovered that the business of the defendant

Petitioner Nealon's Exhibit No. 3—(Continued)
corporation was being conducted in a manner contrary to law, extravagantly, wastefully and in a manner that would ultimately result in the waste and dissipation of all of the assets of the corporation, and that the corporation had been insolvent from about the year 1922, if not before that date, and that it was not a true building and loan association but a fraudulent corporation.

V.

RESULTS OBTAINED FOR BENEFIT OF CREDITORS

That as a result of this investigation made by your petitioner, which is outlined more fully hereinafter, your petitioner and E. G. Monaghan, an active member of the Bar of the United States District Court in and for the Federal District of Arizona, instituted this suit and represented said creditors in all proceedings until final judgment, although those in control of the corporation opposed relief for plaintiffs and those similarly situated all the way to the Supreme Court of the United States; that your petitioner was successful in every step, notwithstanding the great hazard of success, owing to the difficulty of procuring evidence, the novel questions involved, and the brilliant array of attorneys retained to oppose your petitioner, all of which is more fully set forth hereinafter.

That the success of your petitioner in this litigation resulted in saving to the creditors of the Asso-

Petitioner Nealon's Exhibit No. 3—(Continued)
 ciation, assets of a value of \$2,119,662.82, the fol-
 lowing being a summary of the assets of said de-
 fendant corporation now in the actual or construc-
 tive possession of the receiver of said corporation:

[91]

The Arizona assets, as per inventory of April 1, 1937, have a value as per the books of the corporation and receiver, of.....	\$1,597,841.89
The assets in other states, as shown in inventories of November 30, 1935, and April 1, 1937, amount to	1,135,229.34
Total.....	2,733,071.23
Less allowance for loss on realization :	
On Arizona assets	\$248,228.54
On assets in other states.....	365,179.87
Total allowance for loss on realization as per re- port of H. S. McCluskey.....	613,408.41
Realization value of all assets.....	\$2,119,662.82
In addition thereto, choses in action against M. E. Waddoups and other directors of the defendant corporation, from which should be realized \$100,000.00.	

That 2,792 of the creditors of said corporation
 elected to avail themselves of the benefit of the de-
 cree obtained through the efforts of solicitors for
 plaintiffs.

VI.

CREDITORS OF THE CORPORATION

Your petitioner found upon his investigation that
 some 3,840 were creditors of said Association at that
 time; that the bulk of these creditors were people of

Petitioner Nealon's Exhibit No. 3—(Continued) limited means, among them widows, orphans, guardians and old people, endeavoring to safely invest \$5.50 per month and thus in the course of ten and one half years accumulate \$1,000.00; that they possessed but limited business experience which was not sufficient to enable them to analyze the complicated corporate structure of the defendant corporation and they were influenced in making their investments by plausible propaganda presented by the corporation through newspaper articles, circulars and printed matter, as well as by high pressure salesmen. And in the contract itself it was specifically provided that the corporation should hold in [92] trust for each of plaintiffs and those similarly situated real estate mortgages in the amount of 100% of the amount due to each of them, and that these securities in the trust fund should be subject to the constant inspection of the banking officials of Utah or of the state in which the creditor resided.

CONTRACT TRUST PROVISION

The contract contained the following provision:
“Privileges and Conditions.

Security. As security for the performance of the obligations of the Association hereunder, the Association will hold intact, subject to the constant examination and inspection of the banking department of the State of Utah, first mortgages on improved Real Estate in an amount equal to at least one hundred percent of

Petitioner Nealon's Exhibit No. 3—(Continued)
 its liabilities hereunder, less the amount of any
 loans made on this and like certificates or any
 certificates issued in lieu thereof."

VII.

DISCLOSURES OBTAINED BY INVESTIGATION

This investigation disclosed many wrongful acts committed by the defendant corporation resulting in the waste and dissipation of its assets and of the trust funds entrusted to it, and which caused the insolvency of the defendant corporation, some of which were as follows:

UNLAWFUL EXPENDITURES

During a period of 3½ years there had been unlawfully paid to one M. E. Waddoups as commissions on the sale of securities of the Intermountain Building & Loan Association (in many instances he receiving all that was paid into the corporation by the lender) the sum of \$482,886.00

Dividends had been paid to said Waddoups and his associates that were never earned by the corporation and which were wrongfully paid from the trust fund belonging to the plaintiffs and others similarly situated, amounting to the sum of 418,649.50

[93]

That loans had been improvidently made, a large percentage of which were made in violation of the Articles of Incorporation and By-Laws

of the Association, resulting in the loss of.... \$765,182.78

The total loss on these three items along amount to \$1,666,718.28

Petitioner Nealon's Exhibit No. 3—(Continued)

In addition to the above your petitioner found that an exhorbitant and fictitious salary, the amount being impossible to estimate, was being paid to said Waddoups as president of the defendant corporation, and had been during a long period of time upon a basis of \$24,000.00 per year, approximately 45% of which came from the trust fund belonging to the plaintiffs and those similarly situated, and which were paid in violation of the Articles of Incorporation and By-laws of the Association, while said Waddoups devoted only a part of his time to the business of the Intermountain Building & Loan Association.

WRONGFUL MANAGEMENT

Your petitioner further found that said M. E. Waddoups had dominated and controlled said corporation absolutely from the time of its organization in Utah in 1921 until his stock therein was purchased by one Daniel Alexander, in, to-wit, October of 1924, and that upon losing control of said corporation he moved from Salt Lake City, Utah, to Phoenix, Arizona, where he organized the First National Building & Loan Association, and through said latter corporation obtained control of the defendant corporation in, to-wit, August of 1930, and that at all times subsequent to that date up to the time of the appointment of the receiver herein by this Court he retained such control and manipulated its affairs for the benefit of himself and to the injury of the plaintiffs and those similarly situated.

Petitioner Nealon's Exhibit No. 3—(Continued)

WILFULL AND NEGLIGENT CONDUCT

That said Waddoups was using the funds of the Association to finance the operations of the Lincoln Mortgage Company, a [94] a company largely owned and absolutely dominated by him, and the defendant corporation suffered extreme losses through the manipulation of loans made upon buildings erected by said Lincoln Mortgage Company.

That prior to the organization of the defendant corporation said Waddoups had entered into a secret contract with one Daniel Alexander, in which it was agreed that said Alexander should be elected President of the defendant corporation, that Waddoups should not be an officer, but should receive a large commission upon all contracts issued by the corporation of similar tenor to those held by plaintiffs, and that they were to divide these profits derived from this transaction; that Alexander had sued Waddoups for his portion under such agreement, and that Waddoups had settled said suit before it came to trial.

Losses of an extremely large amount, the actual figures of which cannot be obtained, were suffered by the corporation through the negligence of its officers and directors in permitting taxes to accumulate on property on which they held mortgages, (some as long as ten years) and in some cases the amount of the delinquent taxes amounted to more than the value of the property. As a result of this negligence many properties were lost through tax

Petitioner Nealon's Exhibit No. 3—(Continued)
sales, and other properties necessarily have to be abandoned. Nor did these officers and directors of the corporation take any steps in court necessary to secure the payment of such taxes from the rental value of the property.

In the year 1931 alone unlawful dividends paid to the president of the Association and his associates amounted to some \$119,312.68. During the same period, expenses, salaries, costs of collection and other items ran the expense up to \$218,718.79, a sum greater than could have been collected from the interest of all of the mortgages held by the corporation and the rents from all the properties owned by the corporation. [95] The losses of the corporation during that period alone was probably in excess of \$240,000.00.

That the Association had paid large sums of money to withdrawing certificate holders while it was insolvent, with the result that some of such holders had been paid in full while the plaintiffs and those similarly situated would receive under any circumstances only a portion of the money due them.

That the Association had and was continuing to transfer many of its assets to other corporations.

That the Association was not functioning for the purposes for which it was incorporated, that it was doing practically no new business or any profitable business and that it had lost the confidence of the public to such an extent that it could never be profitably conducted, and had lost all right to do any new business in Arizona.

Petitioner Nealon's Exhibit No. 3—(Continued)
VIII.

INSOLVENCY

The investigation disclosed that the conduct of the officers and directors of the defendant corporation had been such that at the time your petitioner filed suit herein, the liabilities of the corporation exceeded the assets of said corporation by more than \$700,000.00, and that the corporation was hopelessly insolvent and had been so since 1922; that its paid-in capital never exceeded \$3,460.00, and this was exhausted before 1922, and from that time on it traveled on money borrowed from these creditors.

IX.

CONCEALMENT OF TRUE STATE
OF AFFAIRS

The true state of affairs of the corporation was concealed from the creditors and the public by the fact that the total liabilities upon obligations like those held by the plaintiffs and those similarly situated never appeared upon the [96] books of the corporation, and further by the fact that thousands of these obligations had been written off on the records of the corporation as if they had been forfeited, there being no authority of law whatsoever upon the part of the corporation and its officers so to do. As a result thereof there were hundreds of the creditors of said corporation who were entitled to participate in this trust fund whose rights had been totally lost. A large portion of the funds so

Petitioner Nealon's Exhibit No. 3—(Continued)
“forfeited” was absorbed by said Waddoups and his associates through a particular form of stock called “expense fund stock”, although said funds belonged in a trust fund for the purpose of protecting those who had furnished money to buy the securities.

X.

FUNDS WRONGFULLY SENT OUT OF STATE

The officers and directors of the corporation also sent large sums of money out of the state for the purpose of giving a preference to residents of other states in the matter of the payment of claims similar to those of the plaintiffs herein and those similarly situated. That among these sums so taken, \$40,000 was sent to California in 1929 and \$50,000 in 1932, which sums were invested in securities that are now held in California (suit is now pending to recover the same for the benefit of the plaintiffs and those similarly situated and is being conducted for and on their behalf, the present receiver of the corporation also being a party thereto). There was also a similar attempt to give a preference to residents of Oregon and Wyoming, all in violation of the rights conferred upon the plaintiffs and those similarly situated.

XI.

FRAUDULENT ADVERTISING

The officers and directors of the defendant corporation also published in newspapers and circulars false

Petitioner Nealon's Exhibit No. 3—(Continued) reports that [97] the defendant corporation and five other building and loan associations, known as the Intermountain Building & Loan Group, dominated by said M. E. Waddoups, had a capital and surplus in excess of \$8,000,000.00, at a time when each of these associations was insolvent and when approximately 45% of this amount represented liabilities of the defendant corporation, these reports being made with the intent of securing further contributions from persons situated as were the plaintiffs in this action and inducing the public to invest its money with the defendant by such false representations.

XII.

FAILURE OF UTAH BANK COMMISSIONER TO ACT

The defendant corporation was charged by law with the duty of filing reports showing its financial condition with the Banking Department of the State of Utah, and did make such purported reports each year for the years 1921 to and including 1932; that although the contracts issued to the plaintiffs and those similarly situated provided that the funds of said Association should be invested in first mortgages on improved real estate in an amount equal to at least 100% of its liabilities therein and that the mortgages should be at all times subject to the constant examination and inspection of the Banking Department of Utah, and although the Banking Department of Utah was empowered to make com-

Petitioner Nealon's Exhibit No. 3—(Continued)
plete examinations of the affairs of said defendant corporation, and did make numerous investigations thereof, and although by these reports and these examinations the said Bank Commissioner was fully informed, or by reasonable diligence could have been informed of the unsafe and unsound condition of said defendant corporation and the misconduct of its officers in declaring dividends from trust funds and other misconduct and neglect of its officers, and the insolvency of the corporation during all of the period from [98] 1922 to 1932, the Bank Commissioner of Utah, with all this information before him and all these resources at his command, failed, refused and neglected to take any steps for the protection of these plaintiffs and those similarly situated.

XIII.

THREATENED REMOVAL OF ASSETS

Your petitioner during the course of his investigation of the affairs of the defendant corporation received information from reliable sources that the corporation was planning to remove all of its personal property, including promissory notes and mortgages, and its books and records, out of the State of Arizona and out of the jurisdiction of this Court, so as to render it practically impossible for the plaintiffs and others similarly situated to protect their rights and to force them to go to a foreign jurisdiction in search of redress which could have only been procured at a prohibitive cost and then

Petitioner Nealon's Exhibit No. 3—(Continued) only by actions similar to that which were taken by your petitioner on behalf of the parties interested; that your petitioner was also informed that the corporation had made settlements with the plaintiffs in the suits pending at that time in the state court so that the court would release the assets of the Intermountain Building & Loan Association from its control in order that these assets could be removed from the state of Arizona.

XIV.

LITIGATION IN STATE COURT

In order to prevent such removal of the assets of the defendant corporation from the jurisdiction of this Court, your petitioner did on the 27th day of June, 1932, institute such proceedings on behalf of the creditors of said defendant corporation in the Superior Court of Arizona, in and for the County of Maricopa, as resulted in the prevention of the removal of the personal property of the defendant corporation [99] from Arizona and thus preserved for the benefit of the plaintiffs herein and those similarly situated such assets and records, which would otherwise have been lost.

In these proceedings in the state court, your petitioner was opposed by many eminent members of the Arizona Bar, including Messrs. John L. Gust, Charles B. Ward, Alexander B. Baker, Louis B. Whitney and L. L. Howe.

Petitioner Nealon's Exhibit No. 3—(Continued)

XV.

NECESSITY FOR EQUITABLE RELIEF—
FEDERAL SUIT

That it was obvious from the investigations made by your petitioner that if a Court of equity did not restrain the waste, mismanagement, misapplication of funds and the dissipation of the assets of the defendant corporation, that all of the assets would be dissipated in a short time, and every investor in this Association would lose every dollar they had put in, and that the only way this could be prevented was for this Court to take constructive possession of such assets and appoint some reliable person of its own selection to husband the dwindling assets of the corporation for the benefit of the creditors of the Association; and on the 18th day of April, 1933, your petitioner, together with said Elizabeth G. Monaghan, caused to be filed in said United States District Court for the District of Arizona a suit in equity for the purpose of recovering the trust fund herein described and conserving the assets of said corporation, having a receiver appointed for that purpose, and obtaining a restraining order and injunction to prevent the disposition or removal of such assets pending suit.

XVI.

CLASS SUIT

That the plaintiffs above named were among the lienholding creditors who employed your petitioner

Petitioner Nealon's Exhibit No. 3—(Continued) to institute [100] suit, and said suit was filed in behalf of said creditors and all others similarly situated, the persons so situated being too numerous to be made parties to the suit, the bill of complaint containing the following paragraph:

“That the plaintiffs bring this action on behalf of themselves and for all others similarly situated who desire to come in and bear their proportion of the expenses of this suit; that the persons so situated are too numerous to be made parties to this action.”

The instant suit was not filed until the insolvency of the corporation and the misconduct of its officers had become widely known in the City of Phoenix, as well as the waste of its assets and the insolvency of the defendant corporation, and also that the First National Building & Loan Association which held the corporate control of the defendant corporation and dominated its affairs, had also become widely known to be insolvent, and said suit was not filed until it was apparent to anyone who examined into the affairs of the defendant corporation that this was the only method available of preventing the further dissipation of the assets, misapplication of funds and waste of the fast dwindling remnant of such assets.

XVII.

2,792 CREDITORS AVAIL THEMSELVES OF BENEFITS SECURED BY PETITIONER

That 2,792 of the creditors of said defendant cor-

Petitioner Nealon's Exhibit No. 3—(Continued)
poration elected to accept the above offer and thereby obligated themselves to pay to your petitioner a reasonable fee for the services rendered to them by him in said suit to the same extent as if they had signed a written contract to that effect before suit was brought. [101]

XVIII.

LEGAL PROBLEMS AND PETITIONER'S INVESTIGATION THEREOF

Your petitioner made an intensive study of the law applicable to the facts ascertained through his investigation, and based the said complaint upon the theory that the plaintiffs and those similarly situated were entitled to equitable relief, and prayed for such relief upon the following theory:

That a federal district court has equitable jurisdiction to entertain a class suit when one of the complainants is a creditor holding a claim in excess of \$3,000.00 secured by an equitable lien; that no state can by statute or otherwise deprive a federal court of its jurisdiction or limit that jurisdiction in any particular;

That the contracts entered into between the defendant corporation and the plaintiffs and those similarly situated, created equitable liens in favor of the latter and created the relation of debtor and creditor between the parties to such contracts; that a federal court of equity at the instance of lien-holding creditors has jurisdiction to appoint a receiver for the assets of a building and loan associa-

Petitioner Nealon's Exhibit No. 3—(Continued)
tion incorporated in a state other than that in which the court is sitting, when the jurisdictional facts exist and justify the granting of equitable relief, and as an incident thereof the appointment of a receiver when the association is doing business in the state where the court is sitting;

That equal protection of the law is granted to each and every creditor of a corporation regardless of his residence or citizenship, and no state can by statute give a preference to its own citizens or residents over those of any other state;

That when a federal court of equity obtains jurisdiction over a corporation by means of a sufficient bill of complaint [102] and personal service upon the corporation, or its authorized agents, such court has the power to compel such corporation to execute deeds and other conveyances to real or personal property in the states where the property is situated when the property involved is a trust property and the conduct of the corporate trustee has been such as to justify its removal and the appointment of a receiver to take possession of its assets;

That the police powers of a state do not extend beyond its physical boundaries and state officers as such cannot exercise any of their delegated powers outside of such state except that, where the statutes of that state vest title to the assets of a delinquent corporation in such officer and proper steps have been taken to wind up the affairs of such delinquent corporation, the statutory receiver may be

Petitioner Nealon's Exhibit No. 3—(Continued)
vested with title to the property actually owned by the corporation wherever situated;

That the articles of incorporation of the defendant corporation and the statutes of Utah vested said defendant corporation with the power to borrow money and pledge its property to secure the payment of its obligations; that the statutes of Utah did not vest its bank commissioner with title to the assets of a defunct building and loan association;

That the defendant corporation was insolvent and its liabilities exceeded its assets by more than \$500,000; that its affairs had been mismanaged by its officers and directors who had wasted its assets for eleven years, had paid dividends amounting to hundreds of *thousand* of dollars to themselves when the corporation was insolvent, the payments being made from funds rightfully belonging to the complainants and those similarly situated; that its expenses exceeded its earnings in 1932 by more than \$70,000; that it paid extravagant salaries for nominal services; that its liabilities were falsely stated upon its books; that it made false statements in its [103] published statements and advertisements in order to obtain money from complainants and those similarly situated; that all of its properties were being wasted to such an extent that there would be no funds left to pay anything to complainants and those similarly situated and their claims would be a total loss unless this Court took complete charge of its affairs and salvaged the same for the benefit of its creditors;

Petitioner Nealon's Exhibit No. 3—(Continued)

That with records in his office revealing this state of the corporation's affairs, the Bank Commissioner of Utah permitted the officers and directors of the corporation to mismanage the affairs of the corporation, waste and absorb its assets, misapply its trust funds, obtain fresh loans from the public by false representations as to its financial condition, and took no steps to correct this condition, and although the Bank Commissioner had accepted the trust to constantly inspect the trust fund which the corporation had agreed to set aside for the protection of the complainants and those similarly situated, he never at any time or at all took any steps to protect such fund or the persons who were being defrauded;

That the state officers of California, Oregon, Idaho and Wyoming were guilty of a like dereliction of duty in permitting such trust funds to be misapplied and wasted and dissipated, although they made repeated examinations of the affairs of the corporation, which if properly conducted would have revealed the truth;

That an imperative necessity existed for the appointment of a receiver if the complainants and those similarly situated were to recover a single dollar of the money they had loaned to the corporation on the faith of their contracts by which the corporation had agreed to hold these assets in trust subject to the constant examination and inspection of the banking department of the state of Utah to secure such loans, and that [104] no other adequate

Petitioner Nealon's Exhibit No. 3—(Continued)
remedy existed for the protection of these creditors other than the one pursued in this proceeding.

XIX.

That process was duly issued in said suit and service had upon the defendant, and a restraining order was immediately issued against the defendant restraining the defendant from disposing of the assets of the defendant corporation and from removing, destroying or concealing its books, records, files, documents and other property of the defendant then in the state of Arizona.

XX.

DEFENDANT'S RESISTANCE—ITS THEORIES

The defendant corporation vigorously resisted the suit of the plaintiffs herein, employing Messrs. Charles B. Ward, R. G. Langmade, Charles L. Rawlins, and George H. Rawlins, all outstanding members of the bar of this Court as their solicitors to defend said suit.

They filed various dilatory motions in which they sought to have the restraining order modified and vacated and attacked the complaint, particularly upon the ground of lack of jurisdiction of this Court and upon the ground of failure to state sufficient facts to entitle the complainant to any relief.

These solicitors were well versed in federal equity practice and ably presented the contentions of the defendant corporation. They denied the right of

Petitioner Nealon's Exhibit No. 3—(Continued)
this Court to give the necessary protection to these plaintiffs and those similarly situated, not only upon the facts of the case but upon the law as well, and further contended:

That this Court had no jurisdiction to appoint a receiver for this corporation; that the sole right to liquidate the assets of the corporation was in the Bank Commissioner of the [105] State of Utah, the corporation having been organized under the laws of that state; that the appointment of a receiver would be an abuse of discretion by the court and would result in the acceleration of the due date of all mortgages held by it and would thus work a great injustice to the mortgagors; that the facts alleged in the bill of complaint did not justify the issuance of a restraining order or an injunction, or the appointment of a receiver; that the plaintiffs were not creditors but stockholders; that the plaintiffs' contracts did not create a lien in their favor;

That plaintiffs were not entitled to withdraw funds or demand the payment of their certificates, basing this contention upon the ground that they had failed and neglected to carry out their contracts with the defendant and that the defendant had kept and performed its contracts with the plaintiffs according to the conditions therein and the by-laws of the Association, which the defendant corporation alleged specifically provided that not more than one half of the fund received by the Association in any one month should be applicable to the payment of withdrawing members and that with-

Petitioner Nealon's Exhibit No. 3—(Continued)
drawals should be paid in rotation according to priority of notice, and that there were other stockholders of the Association who had applied prior in time to the filing of the applications of plaintiffs who had not been paid in rotation or whose turn for payment had not been reached for the reason that sufficient funds of the Association had not been received applicable to the payment of claims of withdrawing members, and contended further that under the laws of Utah not more than one half of the monthly receipts in any one month might be applied to the withdrawals for the month without the consent of the board of directors of the corporation.

The defendant corporation also denied insolvency, mismanagement, waste of assets, and the other material allegations [106] of the complaint.

They supported their contentions by briefs and oral argument of able counsel for defendant.

XXI.

PETITIONER'S REPLY TO DEFENDANT'S CONTENTIONS

Your petitioner and his co-solicitor met the contentions of the defendant by extensive briefs and oral arguments, contending that:

The court had jurisdiction to appoint a receiver of a foreign corporation at the instance of creditors where fraud and insolvency were involved; that the Bank Commissioner of Utah was appointed under

Petitioner Nealon's Exhibit No. 3—(Continued)
the police power of that state and the police power did not extend beyond the territorial jurisdiction of that state;

That the mortgages held by the corporation were straight mortgages that provided a definite term of payment and were not mortgages of such a character whose due date would be accelerated by the failure of the corporation; that the facts alleged, namely insolvency, mismanagement and dissipation of the assets were sufficient grounds for the relief sought and were fully supported by affidavits filed in this proceeding;

That the plaintiffs were not stockholders but creditors; that the contracts created equitable liens and a trust of which the federal courts of equity could and would take jurisdiction; that under defendant's construction of the contracts, the obligations to plaintiffs and those similarly situated would never be payable and that such construction would be a fraud upon such creditors;

That the verified complaint showing insolvency and the affidavits filed in support thereof made a prima facie case which could only be refuted by a showing of solvency, the production of the books and records of the corporation and a [107] complete disclosure of the truth of its condition in the pleadings of the defendant corporation.

Petitioner Nealon's Exhibit No. 3—(Continued)

XXII.

ASSOCIATE COUNSEL

Upon the hearing of the petition for the appointment of the receiver and upon the motion of defendant to modify the restraining order, your petitioner being unable to be present, was represented by Joseph M. Nealon, a member of the bar of 32 years experience, now Chief Justice of the Court of Civil Appeals of the Eighth Supreme Judicial District of Texas, and who at this particular time was of counsel for the trustee in bankruptcy of the Bay Cities Building & Loan Association in the Federal Courts of Los Angeles, California, in which work he had become familiar with the issues involved in this litigation, and said Joseph M. Nealon later assisted your petitioner by furnishing him with briefs and authorities which were of considerable service in the further presentation of the issues involved.

XXIII.

COMMISSIONER MALIA'S ATTEMPTED
INTERVENTION

After various oral arguments and the filing of briefs going to the question of law raised by the motions and demurrers of the defendant, and while the court had the same under consideration, but before the Court had given its decision in the matter, J. A. Malia, then Bank Commissioner of the state of Utah, did, on the 26th day of September, 1933, file a petition for leave to intervene in this

Petitioner Nealon's Exhibit No. 3—(Continued) proceedings for the purpose of having the books, records and movable assets of the corporation removed to the state of Utah, upon the alleged ground that he could have closer supervision over the affairs of the corporation, he alleging in his motion or petition for leave to [108] intervene that the defendant corporation had since 1921 conducted a successful building and loan business. This allegation was made notwithstanding the fact that he then had in his possession full information in the records of his office of the insolvency of the corporation and mismanagement of its affairs, and notwithstanding the fact that he had notice for months previously of the filing of this suit and of the filing of the affidavits in connection therewith which directly called to his attention the true condition of the defendant corporation.

He further alleged that the corporation being a Utah corporation, he was vested with exclusive jurisdiction over the affairs of the defendant to the exclusion of this or any other court, and prayed for an order of this court permitting him to file his complaint in intervention and to be forthwith entered as intervenor in said action, and for other and further general relief. The purpose of said intervention was to divest this Court of all control of the assets of the defendant corporation which were then in the constructive possession of this Court, and to remove such assets beyond the jurisdiction of this Court.

Petitioner Nealon's Exhibit No. 3—(Continued)

Said petition was verified by D. M. Draper, a member of the Bar of the State of Utah and assistant attorney general of that state, and he represented said Malia as Bank Commissioner in presenting said petition to the Court.

XXIV.

PETITIONER OPPOSES MALIA AND IS SUSTAINED

Upon the presentation of the petition of said Malia, your petitioner strongly opposed the same and alleged that there had been no compliance with the Federal equity rules governing intervention, and among other points, alleging that the jurisdiction of the court in the premises had not been admitted as required by such rule. The Court sustained the position of your petitioner and refused to recognize the intervention by [109] Malia. Thereupon an application was then made to the Court to allow Mr. Draper to appear as counsel pro hac vice for the defendant corporation and he then associated himself with the other counsel representing the defendant corporation as one of counsel for the defendant resisting the complaint of the plaintiffs herein. Mr. Draper argued strongly and ably against the right of the Court to appoint a receiver, as against the wishes of the Bank Commissioner of Utah. The Court granted Mr. Draper further time to amend his petition or show any right to intervene in the proceedings.

Petitioner Nealon's Exhibit No. 3—(Continued)

After the hearing on September 26, 1933, to wit on October 3, 1933, the solicitors for the plaintiffs filed formal written motions to dismiss the petition of Malia for leave to intervene, supported by points and authorities, and duly served the same upon him as well as upon the defendant. The Bank Commissioner of Utah did not avail himself of the opportunity granted him by the Court to amend his petition to intervene and on the 3rd day of January, 1934, his petition was dismissed.

XXV.

LAW QUESTIONS DECIDED

After due consideration by the Court on the various briefs and oral arguments made, the Court denied defendant's motions and overruled their demurrers, thus settling all the law questions. The cause then awaited the convenience of the Court for the purpose of setting a date for the hearing of the cause.

XXVI.

SEIZURE OF ASSETS BY MALIA

This was the situation that existed a few days prior to the 17th day of March, 1934, when said J. A. Malia, with the consent and acquiescence of M. E. Waddoups took possession of the assets of the defendant corporation in Arizona (which was [110] then in the physical possession of the corporation), notwithstanding the constructive possession of said assets in this Court. A. J. Bruneau,

Petitioner Nealon's Exhibit No. 3—(Continued)
secretary and general manager of the defendant corporation protested the seizure of these assets without this Court's consent, but without avail.

Malia also attempted to secure possession of the moneys of the corporation deposited in the Valley National Bank of Phoenix and the Phoenix National Bank, but each of these institutions refused to turn over possession of such funds to him. Following this refusal Malia then appeared in the United States District Court and filed an amended petition for leave to intervene as Bank Commissioner of the state of Utah, on March 23, 1934, seeking to procure an order from this Court disclaiming any right to appoint a receiver or take possession of the assets of the defendant and sought an order that would destroy the force and effect of the restraining order issued by the court on April 18, 1933, which was still in effect. He was represented at this time by Messrs. Moore & Shimmel, eminent attorneys of Phoenix.

MALIA'S ALLEGATIONS

Malia based his right to intervene upon the allegation that he had theretofore, on, to wit, March 17, 1934, seized the assets of the defendant corporation in Utah and that he had prior to the time of the filing of said petition procured an order from the state district court in Utah authorizing him to take possession of all of the assets of the corporation, and that he claimed title to the assets upon the theory that he was so vested by the terms of the Utah Statutes.

Petitioner Nealon's Exhibit No. 3—(Continued)
XXVII.

PETITIONER AGAIN OPPOSES MALIA

The solicitors for plaintiffs vigorously opposed the contention of the Bank Commissioner of Utah and filed a petition [111] for the immediate appointment of a receiver and procured an order to show cause thereon. They alleged that said Malia had failed, neglected and refused theretofore to take action to protect the investors in said Association, although he was fully informed, or by reasonable diligence could have been informed of the unsafe and unsound condition of the defendant corporation and that with all this information before him, he did on the 26th day of September, 1933, assert in a written pleading filed in this court that the defendant corporation "since 1921 has conducted a successful building and loan business throughout the several states of the Union under the supervision of the Bank Commissioner of the state of Utah", and your petitioner also alleged that from the records and files in the cause it appeared that he was negligent in his supervision of the affairs of the corporation and lacked the qualities necessary to a proper administration of its affairs, and that he had for a long period of time suffered said corporation to continue business in an unsafe and unsound condition when he had access to their records and could have by the use of ordinary diligence discovered the condition of its affairs.

The defendant corporation and Malia filed answer

Petitioner Nealon's Exhibit No. 3—(Continued) and objections to this petition of plaintiff for the immediate appointment of a receiver and strenuously fought the granting of the petition in the premises. In these proceedings Malia was further represented by two members of the Bar of Salt Lake City, Messrs. H. Van Dam and H. L. Mulliner, in addition to said Messrs. Moore & Shimmel.

XXVIII.

PETITION OF PLAINTIFFS GRANTED

These issues were heard by the Court on the 10th day of April, 1934, at which time evidence was introduced and exhaustive arguments made, and from the bench the Court made the [112] following order:

“I will enter an order of record in this case at this time directing Mr. Malia to leave all the papers and records and files and the property of the Building and Loan Association in the state of Arizona and not remove them. That goes to all assets, books, records, files, money and everything else that belongs to this association; that they do not be removed from this state. That order is in effect until this matter is disposed of or until further order of the Court.”

The cause was ordered submitted on briefs, and your petitioner was directed to prepare a brief upon the particular point involved as to the rights of the Bank Commissioner of Utah in the premises. This

Petitioner Nealon's Exhibit No. 3—(Continued) was the first occasion in the history of law, so far as your petitioner is informed, in which the question of the unfitness of a state official to administer the assets of a delinquent corporation had been raised as a ground for the appointment of a receiver, and proved an important question in the subsequent conduct of the litigation.

On the 20th day of April, 1934, the Court granted the petition of plaintiffs for the appointment of a receiver pendente lite, appointing Hon. Henry S. McCluskey as such receiver and continued in force the injunction and restraining order theretofore entered by it. The Receiver qualified on the date of his appointment and demanded possession of the assets, but his demand was refused.

XXIX.

DEFENDANT CORPORATION AND MALIA APPEAL TO CIRCUIT COURT OF APPEALS

That immediately upon the entering of the interlocutory decree appointing Henry S. McCluskey, Receiver, notice of appeal [113] was given by the defendant corporation and J. A. Malia, Bank Commissioner of Utah. This appeal was granted by the court and supersedeas bond fixed in the sum of \$35,000.00. James R. Moore, solicitor for the proposed appellees, together with your petitioner then appeared before the Honorable Fred C. Jacobs, the Judge who tried the cause, and settled the statement of evidence and the appeal was duly perfected.

Petitioner Nealon's Exhibit No. 3—(Continued)
XXX.

PROCEEDINGS ON APPEAL

In June of 1934 and before the case was at issue in the Circuit Court of Appeals the defendant corporation filed a motion for modification of the injunctive order made by this Court, and also filed a brief therewith. This was opposed by your petitioner and his co-solicitor, who filed an answer and brief thereto. The Circuit Court of Appeals denied this motion of the defendant corporation.

The appellants filed their brief on appeal in due season contending that the appellees were stockholders (the certificates labeled them as such); that the bill of complaint was without equity; that the court abused its discretion in appointing a receiver; that the appellees had no lien upon the assets of the corporation; that the Bank Commissioner of Utah was the statutory liquidator and vested with title to the Association's assets, and that under the full faith and credit clause of the Constitution the court was bound to recognize the title of the Bank Commissioner of Utah to the assets of the corporation; that the court will not appoint a receiver at the suit of an unsecured, nonjudgment creditor, and that the court should not interfere with the internal affairs of a foreign corporation.

Your petitioner and his co-solicitor filed their answering brief thereto within the time required by law contending: [114]

That the labeling of the certificate as stock did

Petitioner Nealon's Exhibit No. 3—(Continued) not make it such, and the instrument itself created the relation of debtor and creditor between the contracting parties; that the facts stated in the complaint showed appellee's right to equitable relief and that they were holding equitable liens and that the defendant was false to its trust; that the facts presented to the court by the verified petition of plaintiff, and otherwise, were such as to require it to grant the injunctive relief and appoint a receiver; that the contracts between appellants and appellees created equitable liens in favor of appellees and the assets of the corporation were a trust fund to secure the repayment of the money borrowed from the appellees and those similarly situated; that the Bank Commissioner of Utah was not vested with title to the assets of the corporation; that the appointment of a receiver is an ancillary remedy which a federal court of equity will grant to a lienholding creditor in a proper case; that the appellees and those similarly situated being creditors and not stockholders the issue was not one of internal management but the right of creditors to prevent the waste of a trust fund; that Malia had no rights in the premises, but if he ever had any he had lost same by his negligence and failure to protect the rights of all lienholding creditors, he having ample information in his own office of the wrongful conduct of the defendant corporation and its insolvency.

While this matter was at issue in the Circuit Court of Appeals the Supreme Court of the United States on the 4th day of February, 1935, handed

Petitioner Nealon's Exhibit No. 3—(Continued) down four decisions involving the rights of statutory liquidators, and the appellants thereupon filed a supplemental brief in the Circuit Court of Appeals based upon the theory that these decisions required a reversal of the decree rendered in the District Court. In opposition to [115] this contention your petitioner and his co-solicitor filed their supplemental brief.

XXXI.

CIRCUIT COURT OF APPEALS SUSTAINS PETITIONER

The cause was argued at San Francisco on the 28th day of February, 1935, by your petitioner, his co-solicitor being present in Court on that occasion.

The matter was taken under advisement, and on the 5th day of August, 1935, the Circuit Court of Appeals rendered its decision in which it affirmed the interlocutory decree of the United States District Court appointing Henry S. McCluskey as receiver and issuing an injunction pertaining to the assets of the corporation, and in its opinion the Circuit Court of Appeals said that the Court below "might well have arrived at the conclusion that the corporate chaos had been a matter of years, rather than months, and that therefore the Bank Commissioner of Utah in whose office admittedly there were filed reports containing 'full information as to the status of the defendant corporation', had shown himself not to be a proper person to husband the dwindling assets of the failing Association."

Petitioner Nealon's Exhibit No. 3—(Continued)

That the appellants thereupon filed motion for the purpose of having certain papers in the District Court sent up to the Circuit Court of Appeals, which motion was opposed by your petitioner and his co-solicitor, and the certiorari therefor was subsequently denied.

XXXII.

PETITIONER SUSTAINED IN UNITED STATES SUPREME COURT

The appellants then filed their motion for rehearing and this was also denied, and they thereupon filed their petition for writ of certiorari in the Supreme Court of the United States and their briefs thereon, in which they made the contentions [116] that the Circuit Court of Appeals had denied full faith and credit to the statutes of Utah and decided a federal question in conflict with the decision of the United States Supreme Court in the case of *Clark v. Willard*, 292 U. S. 112 and 294 U. S., 211; and that in affirming the decision of the District Court appointing a receiver and displacing the Bank Commissioner of Utah, its decision was contrary to the four decisions hereinbefore mentioned which involved the rights of statutory liquidators and which had been rendered while this case was at issue in the Circuit Court of Appeals.

To this your petitioner and his co-solicitor filed their opposing briefs, contending that the decision of the Circuit Court of Appeals was not in conflict with the cases cited, that no federal question

Petitioner Nealon's Exhibit No. 3—(Continued)
or other question of public importance which had not theretofore been settled by the Supreme Court was involved, and that there was no departure from the accepted and usual course of judicial proceedings in the court's decree.

The petition for writ of certiorari was denied by the Supreme Court on November 11, 1935.

XXXIII.

TRIAL AND FINAL DECREE

That on the 29th day of September, 1936, the suit was tried upon the merits, your petitioner and Elizabeth G. Monaghan appearing for the plaintiffs, and James R. Moore, Esq., of the law firm of Moore & Shimmel appearing for the defendant, and after hearing the evidence the Court directed that findings of fact and conclusions of law be prepared by counsel for plaintiffs and that decree be entered for the plaintiffs.

That on towit, the 5th day of January, 1937, the District Court for the District of Arizona made its decree in which it among other things, established the liens of the creditors, affirmed the appointment of Henry S. McCluskey as [117] receiver, and made the injunction theretofore rendered permanent, thereby establishing the rights of said lienholding creditors who desired to come in and obtain the benefits of the judgment upon the conditions named in the invitation contained in the complaint, namely, that they should bear their proportionate share of the expenses of the

Petitioner Nealon's Exhibit No. 3—(Continued) litigation, which included the attorneys' fees herein petitioned for;

And further said decree secured the trust fund wherever situated to the plaintiffs in this suit and those similarly situated, said decree providing and ordering that deeds and other conveyances to the property of the corporation wherever situated should be executed by the corporation to the receiver as trustee for the benefit of all these parties, said decree having been obtained after personal service and appearance by the corporation; that this provision was made for the reason that a receiver appointed by a United States court is not vested with title, but such court has power to compel the defendant to execute deeds and conveyances to its property wherever situated when the same is trust property; that such decree is binding upon all situated similarly to the named plaintiffs, regardless of any active participation in the suit.

XXXIV

INTERVENTIONS

In accordance with the invitation contained in the complaint, other creditors similarly situated to plaintiffs in this action employed their own attorneys, and O'Sullivan and Morgan of Prescott, Arizona, filed motion for leave to intervene in these proceedings as plaintiffs. The court granted this leave to intervene, solicitors for plaintiffs acquiescing in the granting of the motion to inter-

Petitioner Nealon's Exhibit No. 3—(Continued)
vene. However, they never filed a complaint in the proceedings or took other action therein.

H. C. Smoot and Sophia Smoot, through their solicitor [118] E. O. Phlegar, filed a motion for leave to intervene, solicitors for plaintiffs acquiescing therein. Their motion was granted and bill of complaint was filed therein by Mr. Phlegar on behalf of his clients. He appeared in subsequent proceedings up to the termination thereof in the United States District Court, but subsequently withdrew and took no part in the appeal or the proceedings in the United States Supreme Court.

XXXV.

LABOR INVOLVED—OBSTACLES INTERPOSED

That the burden of the conduct of the litigation herein described and the other proceedings in connection with the recovery and preservation of the trust funds herein mentioned fell upon your petitioner, as well as the investigations and research work necessary to the successful conduct of such litigation.

That the labor of your petitioner was arduous and difficult, the results of the litigation by no means certain and the hazard great.

Your petitioner had great difficulty in procuring the evidence to establish the facts for the reason that the books and records were in the exclusive possession of the officers, directors and em-

Petitioner Nealon's Exhibit No. 3—(Continued)
poyees of the defendant corporation, who, as well as their attorneys, refused access thereto to your petitioner and his associate solicitor, and were hostile to plaintiffs. That it thus became necessary for your petitioner to obtain his information from indirect sources.

This necessitated an examination of the records of the Arizona Corporation Commission and the Arizona Banking Department, so far as they pertained to the affairs of this corporation; and investigation into the records of the state courts in foreclosure proceedings and other litigation in which the defendant corporation was involved; interviews with other [119] attorneys who had claims against the defendant and allied corporations; procuring advertising matter and printed statements of the corporation as far as they could be obtained by diligent search.

Further your petitioner attended upon trials in the state courts where proceedings were pending against the corporation which held the corporate control of the defendant, so that he might obtain the evidence necessary to establish the allegations of the complaint of plaintiffs in this action. Your petitioner also had interviews with representatives of the federal government who had come to the office of your petitioner in search of evidence against said M. E. Waddoups, and who in turn furnished your petitioner with valuable information.

It was necessary to employ clerical help in order to obtain copies of the reports of said Associa-

Petitioner Nealon's Exhibit No. 3—(Continued)
tion filed in the office of the Bank Commissioner of Utah annually from the year 1921 up to and including the year 1932, and it was necessary to employ certified public accountants to work with your petitioner and his co-solicitor in order to break down and analyze these reports for the purpose of obtaining the evidence therefrom to establish the insolvency of the corporation material to the controversy, and to establish the fraud and mismanagement of its directors, as well as the negligence of the Bank Commissioner in permitting the corporation to do business when by the reports on file in his office and an examination of the affairs of the corporation, he knew, or could have known, by the use of ordinary diligence, the insolvency of said corporation; that he also sent for and obtained the records of the suit filed by Daniel Alexander against M. E. Waddoups hereinbefore mentioned, in which was disclosed the secret contracts under which the unlawful commissions to the amount of several hundred thousand dollars had been unlawfully paid to Waddoups. [120]

The proof of the insolvency of the defendant corporation and the misconduct of its officers had to be wrung from these published reports, and was a time consuming and laborious process.

The contracts between the defendant corporation and its creditors when examined, disclosed that the corporation was promising to pay such creditors interest at the rate of 8.84% per annum. Outside investigation disclosed that evidence was

Petitioner Nealon's Exhibit No. 3—(Continued) available sufficient to prove that Waddoups and others received commissions of from three to seven percent for obtaining the funds represented by these contracts. These ran the total cost of the money borrowed to the sum of \$67.40 per year for each \$663.00, or a fraction more than 10%, while other evidence obtained by your petitioner disclosed that the bulk of the loans, in Arizona at least, were made upon a basis of 8%. The effect of this was to show that the defendant corporation's total income from its loans was not sufficient to pay the interest upon the money it had borrowed, and that consequently there was no income with which to pay expenses of doing business, and that the corporation was becoming further insolvent each year to the full measure of the expenses incurred by it.

In order to prove these facts it was necessary not only to have the records mentioned from the office of the Bank Commissioner of Utah, together with supporting affidavits, but also outside affidavits showing this excess cost. These were procured showing admissions of M. E. Waddoups that he received a commission of 3% on all such items and affidavits showing payments to other parties for commissions.

Your petitioner made an examination of the statutes of Utah and these disclosed that corporations similar in nature to the defendant were required to file verified annual statements with the Banking Department of Utah, and that it was the duty [121] of the Bank Commissioner of Utah to make

Petitioner Nealon's Exhibit No. 3—(Continued)
periodical examination of the affairs of the corporation.

Your petitioner with this information before him conceived the idea that the defendant could not file such reports for a period of eleven years without revealing the true condition of the corporation, and that a breakdown of such reports by competent accountants familiar with that line of business would necessarily reveal, when taken in connection with other evidence existing and available, that the corporation was and had been insolvent for years; that its expenses had exceeded its income for many years and that these statement would probably reveal the misconduct of the officers and directors of the defendant, as well as the mismanagement of its affairs and waste of its assets. At the instance of your petitioner copies of these reports for eleven years were procured from the office of the Bank Commissioner of Utah, and affidavits were procured from the persons who made these copies to the effect that they were correct. The reports themselves had been sworn to by officers of the corporation at the time they were filed. Upon procuring these, your petitioner and his co-solicitor consulted with Messrs. Willis H. Plunkett and James A. Smith, Certified Public Accountants, familiar with accounting in all its branches, including building and loan accounting, and submitted these reports to these accountants, together with the contracts held by plaintiffs for the purpose of having such reports analyzed and broken down. As a result of such consultation and such work upon the

Petitioner Nealon's Exhibit No. 3—(Continued)
part of Messrs. Plunkett and Smith and the analysis and breaking down of such reports in connection with other evidence assembled by the solicitors for the plaintiffs, your petitioner procured sufficient evidence to establish a *prima facie* case to obtain the relief prayed for in the bill of complaint. [122]

As the facts involved were many and not susceptible of proof by "demonstrable evidence" this case came within the definition of hazardous cases (upon the facts), as the rule is set forth in the case of *United States v. Equitable Trust Co.*, 283 U.S. 738, 75 L.ed 1379.

XXXVI.

NOVEL LAW QUESTIONS INVOLVED

By reason of the fact that many novel questions of law were involved, it was necessary for your petitioner to make an exhaustive study of the applicable principles of law and of the authorities which would sustain those principles upon a hearing in court and prove to the court the right of the plaintiffs to the relief they sought.

It was also necessary to make an exhaustive study of the statutes of Utah to ascertain whether there was anything in those statutes, which as a matter of public policy of that state, would render contracts of the nature of plaintiffs and those similarly situated void in so far as they attempted to create a lien, and this investigation enabled your petitioner to establish to the satisfaction of the various courts the validity of these liens.

Petitioner Nealon's Exhibit No. 3—(Continued)

Much study was necessary also to an interpretation of the statute laws of California, Oregon, Idaho and Wyoming, in which states this corporation was doing business.

Novel and difficult questions of law were involved in this litigation, questions that had not been definitely determined until the decision of the Supreme Court in this case, and to properly present these questions and overcome the contentions of the defendant corporation in opposition thereto, necessitated an immense amount of research work. The applicable principles of law had not at the time your petitioner filed the complaint [123] herein been determined by the Supreme Court of the United States nor by any of the federal courts of appeal and were therefore uncertain.

The contention of your petitioner that the United States Court had a right to appoint a receiver of a building & loan association where the statutes at the domicile of the corporation provided for a liquidator by a state official, when the state official had shown himself unfit to administer the affairs of the delinquent corporation, and when the statutes under which he was appointed were inadequate to give this protection to litigants, a question raised for the first time in the annals of law so far as your petitioner is aware, was upheld by the Circuit Court of Appeals, and for the first time that right was definitely settled and that principle established by the denial of the writ of certiorari by the Supreme Court.

Petitioner Nealon's Exhibit No. 3—(Continued)

The contention of your petitioner that the relation of debtor and creditor was created by the particular contracts, and that a trust and lien was created as against the Building and Loan Association on behalf of the holders of the certificate, also raised for the first time, was established definitely, and in its decision the Circuit Court of Appeals definitely held that despite the label attached to the certificates, the instruments were not stock, but created the relation of debtor and creditor, and that the language of the contract was sufficient to create an equitable lien in favor of such creditor, this also being established for the first time.

Also though prior to this time it had been established that a building and loan association could borrow money and issue its promise to pay in the form of investment certificates, it had not been held that a building and loan association could pledge or mortgage its assets for the purpose of securing loans so obtained, until the final decision in this case. [124]

Another novel question involved the force and effect of a statute of the state under which a corporation was organized when that state permitted a building and loan association to remove its principal office to another state and carry on business in the foreign jurisdiction.

That in the course of his research work, your petitioner examined and analyzed more than six hundred cases bearing upon the issues involved, as well as the statutes of the various states and many

Petitioner Nealon's Exhibit No. 3—(Continued)
text books, this extensive research being necessary by reason of the numerous novel questions of law involved. This case therefore comes within the definition of a hazardous case in regard to the law as set forth in the case of *United States v. Equitable Trust Co.*, *supra*.

XXXVII.

PETITIONER'S WORK

That the major portion of the time of your petitioner for a period of more than three and one half years was devoted to labor for and on behalf of the plaintiffs and those similarly situated in the study of the principles of law governing the case, the analysis of the facts involved and assembling of evidence to support the allegations of the complaint, the preparation of pleadings in the case and obtaining the various orders and decrees in this suit, and in defending the decree of the lower court in the Circuit Court of Appeals and Supreme Court of the United States, and the preparation as to the law and facts necessary to a successful conclusion of the case.

That the necessary work for the preparation of the various briefs in the United States District Court, the Circuit Court of Appeals and the Supreme Court consumed more than 2930 hours, or 586 court days, based upon the standard prevailing in this district,—this exclusive of the time spent in preparation [125] of the necessary pleadings filed in the District Court and in miscellaneous re-

Petitioner Nealon's Exhibit No. 3—(Continued)
search work, examinations made of the records of the Corporation Commission and State Banking Department, attendance on hearings in other courts wherein evidence against the defendant was being developed, attendance at hearings before the United States District Court and Circuit Court of Appeals at San Francisco, examination and study of pleadings and briefs of the opposition, conferences with attorneys for the defendant and the Bank Commissioner of Utah, conferences with Home Owners Loan Corporation officials, and conferences with attorneys representing particular creditors, including attorneys for intervenors, and with various creditors of the defendant corporation.

XXXVIII.

ASSETS RECOVERED FOR BENEFIT OF CREDITORS

That on towit, the 30th day of November, 1935, Rulon F. Starley, who had succeeded J. A. Malia as Bank Commissioner of Utah, turned over to Henry S. McCluskey, Receiver appointed by this court as aforesaid, the physical possession of the assets in Arizona, as well as the books and records of the corporation in Arizona. These assets amounted to the gross sum of \$1,597,841.89, and are now in possession of *Hary* W. Hill, Esq. who succeeded Mr. McCluskey as receiver on April 1, 1937.

The Receiver having been originally appointed by

Petitioner Nealon's Exhibit No. 3—(Continued) this Court and decree having been obtained requiring the conveyance of title, that decree would have to be recognized in other states where the defendant had property. As a result thereof this suit established the rights of these creditors in the property wherever situated and is *res adjudicata* of all questions involved in the proceedings, and is binding upon all those similarly situated to the plaintiffs in this suit regardless of whether they became active participants in the litigation here [126] *By* the decree of this Court it was established that the Receiver was the owner as trustee for the benefit of the creditors of said defendant corporation of gross assets of the defendant corporation in states other than Arizona of \$1,135,229.34.

That subsequent to the 30th day of November, 1935, physical possession of the assets of the defendant in the states of Utah, Idaho and Wyoming were delivered to ancillary receivers appointed in aid of the primary receivership in this Court, and are now being so administered. That the rights of these plaintiffs and those similarly situated, established by the decree of this court, has not yet been recognized by officials in the states of California and Oregon.

The total gross assets thus passing into the hands of the receiver as trustee for the plaintiffs and those similarly situated is \$2,733,071.23.

In addition, there are choses in action against said M. E. Waddoups and other directors and officers of the defendant corporation from which

Petitioner Nealon's Exhibit No. 3—(Continued) should be realized a further sum of, towit, \$100,000.00, your petitioner having laid the foundation for this suit.

Your petitioner and his co-solicitor also laid the foundation for the suit against the Bonding Company bonding the officers for unlawful conduct of the officers and directors of said corporation, there having been a fidelity bond issued for that purpose, and the liability on said bond exceeding the sum of \$50,000.00.

The solicitors for the plaintiffs also laid the foundation for a suit against Waddoups for the sequestration of his property, which suit is now pending in the state of Arizona in and for the County of Maricopa, and your petitioner and his co-solicitor also laid the foundation for a judgment subsequently obtained against M. E. Waddoups and others and by which there was [127] secured a lien upon certain of his properties held by him in the state of Arizona.

That had it not been for the services rendered by your petitioner and his co-solicitor, all of the assets of the defendant corporation would have been dissipated by the defendant corporation, its officers and directors, as shown by the record in this cause.

XXXIX.

NO COMPENSATION RECEIVED BY PETITIONER

That no contract or understanding now exists or was ever made or existed between your petitioner

Petitioner Nealon's Exhibit No. 3—(Continued)
and the plaintiffs or others similarly situated for compensation for his services, other than the agreement that in the event of a successful termination of the litigation he would accept such compensation as the Court should deem reasonable for his services, the same to be paid from the assets coming into the hands of the receiver of the defendant corporation should a receiver be appointed by this Court.

That the prevailing rates of compensation in this community to attorneys in cases where the fees are contingent on recovery range from twenty to thirty-five percent of recovery, depending upon difficulty of proof and hazard involved. That such is the rate of compensation these 2792 creditors who accepted the benefits of said decree, would probably have had to pay had they contracted individually for such services as were rendered by the solicitors for the plaintiffs in this cause.

That no application has heretofore been made by your petitioner for compensation for the services rendered to the plaintiffs or those similarly situated for the bringing of suit, or for the services rendered by your petitioner as described in this petition. [128]

XL.

EXPENSES INCURRED BY PETITIONER

That in the investigation, preparation and trial of said suit and on the appeals to the Circuit Court of Appeals and Supreme Court of the United

Petitioner Nealon's Exhibit No. 3—(Continued)
 States, your petitioner has incurred the following
 expenses advanced by him, totaling the sum of
 \$1,330.40, for which he seeks reimbursement:

Printing of appellee's brief, U. S. Circuit Court of Appeals	\$ 297.90
Printing of Supplemental brief, U. S. Circuit Court of Appeals	48.80
Printing of Respondent's brief in Supreme Court of United States	73.93
Paid Brady & Atehison, attorneys at law, Salt Lake City, Utah, for legal services in connec- tion with procuring records in Utah.....	25.00
Paid S. A. Nelligan for clerical work procuring copies of records in Utah.....	17.00
Paid for surety bonds required by Court.....	120.30
Arizona Corporation Commission, certified copies of records	9.00
United States Marshal, service of papers.....	16.20
County Recorder, certified copy of record.....	3.35
Clerk of District Court, Utah, certified copy of record	25.75
Larsen & Larsen, Court Reporters, copy testi- mony of Bruneau and Waddoups.....	8.00
Tucker & Morgan, court reporters.....	5.00
Photostatic copy of certificate.....	1.44
Clerk of District Court, certified copies orders....	12.30
Judge J. H. Sundheim, copy of record.....	2.50
Sundry telegrams	14.57
Judge J. H. Sundheim, copy opinion 3rd Circuit Court of Appeals	6.18
Postage on briefs	12.23
Railroad fare and expenses (5 days) to San Francisco	64.95
Paul P. O'Brien, Clerk 9th CCA, copy of opinion	6.00
Expense stenographic service, pleadings, briefs, etc. (16 weeks @ \$35.....	560.00
Total.....	\$1330.40

Wherefore your petitioner prays that this Hon-

Petitioner Nealon's Exhibit No. 3—(Continued)
orable Court allow to your petitioner such sum as it deems reasonable compensation to him for his services rendered in connection with the preparation, institution and trial of said cause, including the services rendered by him on the appeal from the interlocutory decree rendered herein to the Ninth Circuit Court of Appeals and [129] for his services in opposing the petition of the defendant corporation and J. A. Malia to the Supreme Court of the United States for a writ of certiorari to review the proceedings in the District Court and Circuit Court of Appeals, such allowance to be on the basis of one-half of such sum as the Court may find to be a reasonable sum for all legal services rendered by the solicitors for the plaintiffs in the premises.

Your petitioner further prays that he be allowed the additional sum of \$1,330.40 for out-of-pocket expenses necessarily incurred by him in the premises as hereinbefore set forth.

Your petitioner further prays that this Court establish and fix a lien upon the assets now in the hands of the Receiver of the Intermountain Building & Loan Association, an Utah corporation, for such allowance as it may make to your petitioner upon the foregoing petition for services rendered and expenses incurred, and that said Receiver be authorized and directed to pay the amount of such allowance to your petitioner from the funds of the receivership estate now in his possession, and that each of the 2,792 creditors of said Association who

Petitioner Nealon's Exhibit No. 3—(Continued)
 have elected to accept the benefit of your petitioner's efforts, bear their proportion of such allowance; and that in the event this Court should deem it inadvisable at this time to pay to your petitioner the full amount which he would be entitled to for his services as solicitor for the plaintiffs in said proceeding, that this Court make an allowance to your petitioner for the amount of the out-of-pocket expenses incurred by him and an allowance upon account for the services rendered by him.

(Signed) THOMAS W. NEALON

Petitioner [130]

State of Arizona

County of Maricopa—ss.

Thomas W. Nealon being first duly sworn on oath deposes and says: That he is the petitioner above named; that he has read the foregoing petition, knows the contents thereof, and that the same are true, in substance and in fact.

(Signed) THOMAS W. NEALON

Subscribed and Sworn to before me this 14 day of October, 1937.

(Signed) W. F. DAINS

Notary Public

My Commission Expires: Oct. 28, 1938. [131]

INDEX

	Paragraph	Page
Petitioner's Professional Experience	I	2
Petitioner's Employment	II	2
Investigation of the Facts.....	III	2
Condition of Defendant Corporation.....	IV	3

Petitioner Nealon's Exhibit No. 3—(Continued)

Index—(Continued)

	Paragraph	Page
Results Obtained for Benefit of Creditors.....	V	3-4
Creditors of the Corporation.....	VI	4-5
Disclosures Obtained by Investigation.....	VII	5
Unlawful Expenditures		5-6
Wrongful Management		6
Wilful and Negligent Conduct.....		6-8
Insolvency	VIII	8
Concealment of True State of Affairs.....	IX	8-9
Funds Wrongfully Sent Out of State.....	X	9
Fraudulent Advertising	XI	9
Failure of Utah Bank Commissioner to Act	XII	10-11
Threatened Removal of Assets.....	XIII	11
Litigation in State Court.....	XIV	11-12
Necessity for Equitable Relief—Federal Suit	XV	12
Class Suit	XVI	12-13
2,792 Creditors Avail Themselves of Benefits Secured by Petitioner.....	XVII	13
Legal Problems and Petitioner's Investigation Thereof	XVIII	14-17
Restraining Order Issued	XIX	17
Defendant's Resistance—Its Theories.....	XX	17-19
Petitioner's Reply to Defendant's Contentions	XXI	19-20
Associate Counsel	XXII	20
Commissioner Malia's Attempted Intervention	XXIII	20-21
Petitioner Opposes Malia and Is Sustained	XXIV	21-22
Law Questions Decided.....	XXV	22
Seizure of Assets by Malia.....	XXVI	22-23
Malia's Allegations		23
Petitioner Again Opposes Malia.....	XXVII	23-24
Petition of Plaintiffs Granted.....	XXVIII	24-25
Defendant Corporation and Malia Appeal to Circuit Court of Appeals.....	XXIX	25-26
Proceedings on Appeal.....	XXX	26-28
Circuit Court of Appeals Sustains Petitioner	XXXI	28
Petitioner Sustained in United States Supreme Court	XXXII	28-29
Trial and Final Decree.....	XXXIII	29-30

Petitioner Nealon's Exhibit No. 3—(Continued)

Index—(Continued)

	Paragraph	Page
Interventions	XXXIV	30-31
Labor Involved—Obstacles Interposed	XXXV	31-35
Novel Law Questions Involved.....	XXXVI	35-37
Petitioner's Work	XXXVII	37-38
Assets Reecovered for Benefit of Creditors....	XXXVIII	38-40
No Compensation Received by Petitioner.....	XXXIX	40
Expenses Incurred by Petitioner.....	XL	41
Prayer		41-42
		[132]

[Endorsed]: Filed Oct. 15, 1937, Edward W. Scruggs, Clerk, United States District Court for the District of Arizona. By Helen Roach, Deputy Clerk.

[Endorsed]: Petr. Nealon's Exhibit No. 3. Submitted and Filed Dec. 20, 1937. Edward W. Scruggs, Clerk, United States District Court for the District of Arizona. By Wm. H. Loveless, Chief Deputy Clerk. Case No. E-268 Phx. Gallegos vs. Intermountain. [133]

PETITIONER NEALON'S EXHIBIT No. 4

[Title of District Court and Cause.]

DEPOSITION OF WILLIAM H. BURGES,

a witness on behalf of Thomas W. Nealon, Petitioner, in the above-entitled cause.

Pursuant to the notice hereunto annexed, the said William H. Burges appeared before me, Rose B. Greenawalt, a Notary Public in and for the County

Petitioner Nealon's Exhibit No. 4—(Cont.)
(Deposition of William H. Burges.)
of El Paso, State of Texas, at the office of Turney, Burges, Culwell & Pollard, 1100 First National Bank Building, El Paso, Texas, at 10:00 o'clock A.M., on the 14th day of December, 1937, and having been by me first duly sworn to testify the truth, the whole truth and nothing but the truth in the above entitled matter, testified as follows:

Direct Examination

By Mr. Nealon:

Q. State your name, please.

A. William H. Burges.

Q. What is your profession?

A. I am a lawyer.

Q. How long have you been practicing law?

A. Forty-eight years last June.

Q. What is your place of residence?

A. El Paso, Texas.

Q. You are a member of the bar of the Supreme Court of the United States? [134]

A. Yes.

Q. And have practiced before that Court?

A. I have appeared on a number of briefs in that Court. I have not personally argued a case in the Supreme Court.

Q. You have practiced in the States of Arizona and California, tried cases there?

A. Yes, and New Mexico, Texas and Illinois.

Q. And before what Circuit Court of Appeals?

A. United States Circuit Court of Appeals for the Fifth Circuit, and United States Circuit Court of Appeals for the Seventh Circuit.

Petitioner Nealon's Exhibit No. 4—(Cont.)
(Deposition of William H. Burges.)

Q. What is the name of your law firm, Mr. Burges?

A. Turney, Burges, Culwell & Pollard.

Q. You have conducted suits, have you not, where the amounts involved were more than one million dollars?

A. Oh, yes.

Q. Several of them?

A. Several of them.

Q. Are you familiar with the fees prevailing in the States of Texas, Arizona and California?

A. In a general way in California and fairly well in Arizona and in this State very well.

Q. You know the Petitioner, Thomas W. Nealon?

A. I do.

Q. How long have you known him?

A. Thirty-three or thirty-four years.

Q. Will you state your opinion as to his standing as an attorney?

A. His standing at the bar of the State at which he practices is as good as anybody else's. In my judgment he is a competent lawyer of high standing. According to my knowledge and belief he has had rather an extensive and successful practice for a number of years. [135]

In addition to your own knowledge and observation of the case assume the following:

I.

That Thomas W. Nealon was one of the solicitors for the plaintiffs in Cause No. E-268 Phoenix, in the District Court of the United States for the Fed-

Petitioner Nealon's Exhibit No. 4—(Cont.)
(Deposition of William H. Burges.)

eral District of Arizona, in a class suit in which Guadalupe R. Gallegos, Francisca Gallegos, his wife, Inga G. Gudmundsen and Mata E. Dexter, in their own behalf and in behalf of others similarly situated, were the plaintiffs and the Intermountain Building & Loan Association, a corporation, was defendant, and that said suit was brought by said named plaintiffs in their own behalf and in behalf of others similarly situated.

II.

That said Thomas W. Nealon has been since 1914 and now is a member of the Bar of the Supreme Court of Arizona and of the United States District Court in and for the Federal District of Arizona, and has been at all times since said date in active practice before the state courts of Arizona and the Federal Courts of the District of Arizona; That he is and has been for many years an active member of the State Bar of California and of the United States Circuit Court of Appeals for the Ninth Circuit; and that during all of said period a large portion of his practice has been upon the equity side of the Federal Court.

III.

Assume that many months prior to April 18, 1933, he was employed by certain lienholding creditors of the Intermountain Building and Loan Association, an Utah corporation, to file suits against said corporation and establish equitable liens by

Petitioner Nealon's Exhibit No. 4—(Cont.)
(Deposition of William H. Burges.)
court decree to recover trust property from the delinquent corporation and procure the appointment of a receiver to preserve and conserve the assets of said corporation then being wasted and dissipated [136] by said corporation, its officers and directors; that the plaintiffs named in said suit were among the lienholding creditors who employed said Thomas W. Nealon to institute said suit, and said suit was filed on April 18, 1933 in behalf of said creditors and all others similarly situated, the persons so situated being too numerous to be made parties to the suit, the bill of complaint containing the following paragraph:

“That the plaintiffs bring this action on behalf of themselves and for all other similarly situated who desire to come in and bear their proportion of the expenses of this suit; that the persons so situated are too numerous to be made parties to this action.”

IV.

Assume that said Thomas W. Nealon immediately upon being employed as aforesaid, began an investigation of the affairs of said corporation, searching all available sources of information to ascertain the financial condition of said corporation, the nature and extent of its assets and liabilities, the conduct of its officers and directors, as well as a study of the law applicable to the existing situation, and that in the course of this investigation he discovered the following:

Petitioner Nealon's Exhibit No. 4—(Cont.)
(Deposition of William H. Burges.)

1. That the business of the Intermountain Building & Loan Association, an Utah corporation, was being conducted in a manner that would ultimately result in the waste and dissipation of all of the assets of the corporation, and that the corporation had been insolvent from about the year 1922, if not before that date, and that it is was not a true building and loan association but a fraudulent corporation.

2. That some 3,840 were creditors of said Association at that time; that the bulk of these creditors were people of limited means, among them widows, orphans, guardians and old people, endeavoring to safely invest \$5.50 per month and thus in the course of ten and one half years accumulate \$1,000.00; that they possessed but limited business experience which was not [137] sufficient to enable them to analyze the complicated corporate structure of the defendant corporation and they were influenced in making their investments by plausible propaganda presented by the corporation through newspaper articles, circulars and printed matter, as well as by high pressure salesmen; that in the contract itself it was specifically provided that the corporation should hold in trust for each of the plaintiffs and those similarly situated real estate mortgages in the amount of 100% of the amount due to each of them, and that these securities in the trust fund should be subject to the constant inspection of the banking officials of Utah or of the state

Petitioner Nealon's Exhibit No. 4—(Cont.)
(Deposition of William H. Burges.)

in which the creditor resided, the contract containing the following provision:

“Security. As security for the performance of the obligations of the association hereunder, the Association will hold intact, subject to the constant examination and inspection of the banking department of the State of Utah, first mortgages on improved Real Estate in an amount equal to at least one hundred percent of its liabilities hereunder, less the amount of any loans made on this and like certificates or any certificates issued in lieu thereof.”

3. The investigation disclosed many wrongful acts committed by the Intermountain Building & Loan Association, an Utah corporation, resulting in the waste and dissipation of its assets and of the trust funds entrusted to it, and which caused the insolvency of the corporation, some of which were as follows:

During a period of 3½ years there had been unlawfully paid to one M. E. Waddoups as commission on the sale of securities of the said corporation (in many instances he receiving all that was paid into the corporation by the lender) the sum of..... \$ 482,886.00

Dividends had been paid to said Waddoups and his associates that were never earned by the said corporation and which were wrongfully paid from the trust fund belonging to the plaintiffs and others similarly situated, amounting to..... 418,649.50

Petitioner Nealon's Exhibit No. 4—(Cont.)
(Deposition of William H. Burges.)

Loans had been improvidently made, a large percentage of which were made in violation of the Articles of Incorporation and By-Laws of the Association, resulting in the loss of	765,182.78
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The total loss on these three items alone amount to	\$1,666,718.28
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[138]

4. That an exorbitant and fictitious salary, the amount being impossible to estimate, was being paid to said Waddoups as president of said corporation, and had been during a long period of time upon a basis of \$24,000.00 per year, approximately 45% of which came from the trust fund belonging to the plaintiffs named and those similarly situated, and which were paid in violation of the Articles of Incorporation and By-Laws of the Association while said Waddoups devoted only a part of his time to the business of said Intermountain Building & Loan Association.

5. That said M. E. Waddoups had dominated and controlled said corporation absolutely from the time of its organization in Utah in 1921 until his stock therein was purchased by one Daniel Alexander, in, towit, October of 1924, and that upon losing control of said corporation he moved from Salt Lake City, Utah, to Phoenix, Arizona, where he organized the First National Building & Loan Association, and through said latter corporation obtained control of the said Intermountain Building

Petitioner Nealon's Exhibit No. 4—(Cont.)
(Deposition of William H. Burges.)

& Loan Association in towit, August of 1930, and that at all times subsequent to that date up to the time of the appointment of the receiver herein by the United States District Court he retained such control and manipulated its affairs for the benefit of himself and to the injury of the plaintiffs named and those similarly situated.

6. That said Waddoups was using the funds of the said Association to finance the operations of the Lincoln Mortgage Company, a company largely owned and absolutely dominated by him, and the Association suffered extreme losses through the manipulation of loans made upon buildings erected by said Lincoln Mortgage Company.

7. That prior to the organization of the Association said Waddoups had entered into a secret contract with one Daniel [139] Alexander, in which it was agreed that said Alexander should be elected President of said Association, that Waddoups should not be an officer, but should receive a large commission upon all contracts issued by the corporation of similar tenor to those held by the plaintiffs, and that they were to divide these profits derived from this transaction; that Alexander had sued Waddoups for his portion under such agreement, and that Waddoups had settled said suit before it came to trial.

8. That losses of an extremely large amount, the actual figures of which cannot be obtained, were suffered by the corporation through the negligence

Petitioner Nealon's Exhibit No. 4—(Cont.)

(Deposition of William H. Burges.)

of its officers and directors in permitting taxes to accumulate on property which they held mortgages (some as long as ten years), and in some cases the amount of the delinquent taxes amounted to more than the value of the property. As a result of this negligence many properties were lost through tax sales, and other properties necessarily have to be abandoned; nor did these officers and directors of the corporation take any steps in court necessary to secure the payment of such taxes from the rental value of the property.

9. That in the year 1931 alone unlawful dividends paid to the president of the Association and his associates amounted to some \$119,312.68; that during the same period, expenses, salaries, costs of collection and other items ran the expense up to \$218,718.79, a sum greater than could have been collected from the interest of all of the mortgages held by the corporation and the rents from all the properties owned by the corporation; that the losses of the corporation during that period alone was probably in excess of \$240,000.00.

10. That the Association had paid large sums of money to withdrawing certificate holders while it was insolvent, with the result that some of such holders had been paid in full while [140] the plaintiffs named and those similarly situated would receive under any circumstances only a portion of the money due them.

Petitioner Nealon's Exhibit No. 4—(Cont.)
(Deposition of William H. Burges.)

11. That the Association had and was continuing to transfer many of its assets to other corporations.

12. That the Association was not functioning for the purposes for which it was incorporated, that it was doing practically no new business or any profitable business and that it had lost the confidence of the public to such an extent that it could never be profitably conducted, and had lost all rights to do any new business in Arizona.

13. The investigation disclosed that the conduct of the officers and directors of the Association had been such that at the time the suit was filed, the liabilities of the corporation exceeded its assets by more than \$700,000.00, and that the corporation was hopelessly insolvent and had been so since 1922; that its paid-in capital never exceeded \$3,460.00, and this was exhausted before 1922, and from that time on it traveled on money borrowed from its creditors.

14. That the true state of the affairs of the corporation was concealed from the creditors and the public by the fact that the total liabilities upon obligations like those held by the plaintiffs named and those similarly situated never appeared upon the books of the corporation, and further by the fact that thousands of these obligations had been written off on the records of the corporation as if they had been forfeited, there being no authority of law whatsoever upon the part

Petitioner Nealon's Exhibit No. 4—(Cont.)

(Deposition of William H. Burges.)

of the corporation and its officers so to do. As a result thereof there were hundreds of the creditors of said corporation who were entitled to participate in this trust fund whose rights had been totally lost. A large portion of the funds so "forfeited" was absorbed by said Waddoups and his associates through a particular form of stock called "expense fund stock", although said funds belonged in a [141] trust fund for the purpose of protecting those who had furnished money to buy the securities.

15. The officers and directors of the corporation also sent large sums of money out of the state for the purpose of giving a preference to residents of other states in the matter of the payment of claims similar to those of the plaintiffs named and those similarly situated; that among these sums so taken \$40,000.00 was sent to California in 1929 and \$50,000.00 in 1932, which sums were invested in securities that are now held in California, and that there was a similar attempt to give a preference to residents of Oregon and Wyoming, all in violation of the rights conferred upon the plaintiffs and those similarly situated.

16. The officers and directors of the Association also published in newspapers and circulars false reports that the said corporation and five other building and loan associations, known as the Intermountain Building & Loan Group, which was dominated by the said M. E. Waddoups, had a

Petitioner Nealon's Exhibit No. 4—(Cont.)
(Deposition of William H. Burges.)
capital and surplus in excess of \$8,000,000.00, at a time when each of these associations were insolvent and when approximately 45% of this amount represented liabilities of the defendant corporation, these reports being made with the intent of securing further contributions from persons situated as were the plaintiffs named in the suit filed and inducing the public to invest its money with the corporation by such false representations.

17. That the contracts between the corporation and its creditors disclosed that the corporation was promising to pay such creditors interest at the rate of 8.84% per annum and that Waddoups and others received commissions of from three to seven percent for obtaining the funds represented by these contracts. These ran the total cost of the money borrowed to the sum of \$67.40 per year for each \$663.00, or a fraction more than 10%. [142] The bulk of the loans, in Arizona at least, were made upon a basis of 8%. The total income therefore which the corporation received from its loans was not sufficient to pay the interest upon the money it had borrowed, and consequently there was no income with which to pay the expenses of doing business, and the corporation was becoming further insolvent each year to the full measure of the expenses incurred by it.

Petitioner Nealon's Exhibit No. 4—(Cont.)
(Deposition of William H. Burges.)

V

Assume that the corporation was charged by law with the duty of filing reports showing its financial condition with the Banking Department of the state of Utah, and did make such purported reports each year for the years 1921 to and including 1932; that although the contracts issued to the plaintiffs named in said suit and those similarly situated provided that the funds of said Association should be invested in first mortgages on improved real estate in an amount equal to at least 100% of its liabilities thereon and that the mortgages should be at all times subject to the constant examination and inspection of the Banking Department of Utah, and although the Banking Department of Utah was empowered to make complete examinations of the affairs of said Association, and did make numerous investigations thereof, and although by these reports and these examinations the said Bank Commissioner was fully informed, or by reasonable diligence could have been informed of the unsafe and unsound condition of the said corporation and the misconduct of its officers in declaring dividends from trust funds and other misconduct and neglect of its officers, and the insolvency of the corporation during all of the period from 1922 to 1932, the Bank Commissioner of Utah, with all this information before him and all these resources at his command, failed, refused and neglected to take any steps for

Petitioner Nealon's Exhibit No. 4—(Cont.)
(Deposition of William H. Burges.)
the protection of the plaintiffs named and those
similarly situated. [143]

VI

Assume that during the course of his investigation of the affairs of said corporation, said Thomas W. Nealon received information from reliable sources that the corporation was planning to remove all of its personal property, including promissory notes and mortgages, and its books and records, out of the State of Arizona and out of the jurisdiction of this Court, so as to render it practically impossible for the plaintiffs named and those similarly situated to protect their rights and to force them to go to a foreign jurisdiction in search of redress which could have only been procured at a prohibitive cost and then only by actions similar to that which were taken by said Thomas W. Nealon on behalf of the parties interested; that he was also informed that the corporation had made settlements with plaintiffs in suits that were pending at the time in the state courts, so that the court would release the assets of said Intermountain Building & Loan Association from its control in order that these assets could be removed from the state of Arizona; and that in order to prevent such removal of the assets of said corporation from the jurisdiction of the United States District Court, said Thomas W. Nealon did on the 27th day of June, 1932, in-

Petitioner Nealon's Exhibit No. 4—(Cont.)

(Deposition of William H. Burges.)

stitute such proceedings on behalf of the creditors of said corporation in the Superior Court of Arizona, in and for the County of Maricopa, as resulted in the prevention of the removal of the personal property of the said corporation from Arizona and thus preserved for the benefit of the plaintiffs in this cause and those similarly situated such assets and records, which would otherwise have been lost; that in these proceedings in the state court, he was opposed by many eminent members of the Arizona Bar, including Messrs. John L. Gust, Charles B. Ward, Alexander B. Baker, Louis B. Whitney and L. L. Howe. [144]

VII

Assume that it was obvious from the investigations made by said Thomas W. Nealon that if a court of equity did not restrain the waste, mismanagement, misapplication of funds and the dissipation of the assets of said corporation, that all of the assets would be dissipated in a short time, and every investor in said Association would lose every dollar they had put in, and that the only way this could be prevented was for the United States District Court to take constructive possession of such assets and appoint some reliable person of its own selection to husband the dwindling assets of the corporation for the benefit of the creditors of the Association; and that on the 18th day of April, 1933, said Thomas W. Nealon, to-

Petitioner Nealon's Exhibit No. 4—(Cont.)
(Deposition of William H. Burges.)

gether with Elizabeth G. Monaghan, caused to be filed in said United States District Court for the District of Arizona a suit in equity for the purpose of recovering the trust fund herein described and conserving the assets of said corporation, having a receiver appointed for that purpose and obtaining an restraining order and injunction to prevent the disposition or removal of such assets pending suit. That said suit was not filed until the insolvency of the corporation and the misconduct of its officers had become widely known in the City of Phoenix, as well as the waste of its assets, and also that the First National Building & Loan Association which held the corporate control of the said corporation and dominated its affairs, had also become widely known to be insolvent, and said suit was not filed until it was apparent to anyone who examined into the affairs of the said corporation that this was the only method available of preventing the further dissipation of the assets, misapplication of funds and waste of the fast dwindling remnant of such assets. [145]

VIII

Assume that said Thomas W. Nealon made an intensive study of the law applicable to the facts ascertained through his investigation, and based the said complaint upon the theory that the plaintiffs named and those similarly situated were en-

Petitioner Nealon's Exhibit No. 4—(Cont.)

(Deposition of William H. Burges.)

titled to equitable relief, and prayed for such relief upon the following theory:

That a federal district court has equitable jurisdiction to entertain a class suit when one of the complainants is a creditor holding a claim in excess of \$3,000.00 secured by an equitable lien; that no state can by statute or otherwise deprive a federal court of its jurisdiction or limit that jurisdiction in any particular;

That the contracts entered into between the defendant corporation and the plaintiffs and those similarly situated, created equitable liens in favor of the latter and created the relation of debtor and creditor between the parties to such contracts; that a federal court of equity at the instance of lien-holding creditors has jurisdiction to appoint a receiver for the assets of a building and loan association incorporated in a state other than that in which the court is sitting, when the jurisdictional facts exist and justify the granting of equitable relief, and as an incident thereof the appointment of a receiver when the association is doing business in the state where the court is sitting;

That equal protection of the law is granted to each and every creditor of a corporation regardless of his residence or citizenship, and no state can by statute give a preference to its own citizens or residents over those of any other state;

That when a federal court of equity obtains jurisdiction over a corporation by means of a

Petitioner Nealon's Exhibit No. 4—(Cont.)
(Deposition of William H. Burges.)
sufficient bill of complaint and personal service upon the corporation, or its authorized [146] agents, such court has the power to compel such corporation to execute deeds and other conveniences to real or personal property in the states where the property is situated when the property involved is a trust property and the conduct of the corporate trustee has been such as to justify its removal and the appointment of a receiver to take possession of its assets;

That the police powers of a state do not extend beyond its physical boundaries and state officers as such cannot exercise any of their delegated powers outside of such state except that, where the statutes of that state vest title to the assets of a delinquent corporation in such officer and proper steps have been taken to wind up the affairs of such delinquent corporation, the statutory receiver may be vested with title to the property actually owned by the corporation wherever situated;

That the articles of incorporation of the defendant corporation and the statutes of Utah vested said defendant corporation with the power to borrow money and pledge its property to secure the payment of its obligations; that the statutes of Utah did not vest its bank commissioner with title to the assets of a defunct building and loan association;

That the defendant corporation was insolvent and its liabilities exceeded its assets by more than

Petitioner Nealon's Exhibit No. 4—(Cont.)

(Deposition of William H. Burges.)

\$500,000; that its affairs had been mismanaged by its officers and directors who had wasted its assets for eleven years, had paid dividends amounting to hundreds of thousands of dollars to themselves when the corporation was insolvent, the payments being made from funds rightfully belonging to the complainants and those similarly situated; that its expenses exceeded its earnings in 1932 by more than \$70,000; that it paid extravagant salaries for nominal services; that its liabilities were falsely stated upon its books; that it made false statements in its published statements and advertisements in order to obtain money from complainants and [147] those similarly situated; that all of its properties were being wasted to such an extent that there would be no funds left to pay anything to complainants and those similarly situated and their claims would be a total loss unless the United States District Court took complete charge of its affairs and salvaged the same for the benefit of its creditors;

That with records in his office revealing this state of the corporation's affairs, the Bank Commissioner of Utah permitted the officers and directors of the corporation to mismanage the affairs of the corporation, waste and absorb its assets, misapply its trust funds, obtain fresh loans from the public by false representations as to its financial condition, and took no steps to correct this condition, and although the Bank Commissioner

Petitioner Nealon's Exhibit No. 4—(Cont.)
(Deposition of William H. Burges.)

had accepted the trust to constantly inspect the trust fund which the corporation had agreed to set aside for the protection of the complainants named and those similarly situated; he never at any time, or at all, took any steps to protect such fund or the persons who were being defrauded;

That the state officers of California, Oregon, Idaho and Wyoming were guilty of a like dereliction of duty in permitting such trust funds to be misapplied and wasted and dissipated, although they made repeated examinations of the affairs of the corporation, which if properly conducted would have revealed the truth;

That an imperative necessity existed for the appointment of a receiver if the complainants named and those similarly situated were to recover a single dollar of the money they had loaned to the corporation on the faith of their contracts by which the corporation had agreed to hold these assets in trust subject to the constant examination and inspection of the banking department of the state of Utah to secure such loans, and that [148] no other adequate remedy existed for the protection of these creditors other than the one pursued in this proceeding.

IX.

Assume that process was duly issued in said suit and service had upon the defendant, and that a restraining order was immediately issued against

Petitioner Nealon's Exhibit No. 4—(Cont.)
(Deposition of William H. Burges.)
the defendant restraining the defendant corporation from disposing of its assets and from removing, destroying or concealing its books, records, files, documents and other property of the corporation then in the state of Arizona.

X.

Assume that the defendant corporation vigorously resisted the suit of the plaintiffs, employing Messrs. Charles B. Ward, R. G. Langmade, Charles L. Rawlins and George H. Rawlins, all outstanding members of the Bar of the United States District Court as their solicitors to defend the said suit; that they filed various dilatory motions in which they sought to have the restraining order modified and vacated and attacked the complaint, particularly upon the ground of lack of jurisdiction of the United States District Court for the Federal District of Arizona and upon the ground of failure to state sufficient facts to entitle the complainants to any relief; that said solicitors were well versed in federal equity practice and ably presented the contentions of the defendant corporation; that they denied the right of said Court to give the necessary protection to the plaintiffs named and those similarly situated, not only upon the facts of the case but upon the law as well, and further contended:

That the United States District Court for the Federal District of Arizona had no jurisdiction to appoint a receiver for said corporation; that

Petitioner Nealon's Exhibit No. 4—(Cont.)
(Deposition of William H. Burges.)

the sole right to liquidate the assets of the corporation was in the Bank Commissioner of the State of Utah, the corporation having been organized under the laws of [149] that state; that the appointment of a receiver would be an abuse of discretion by the court and would result in the acceleration of the due date of all mortgages held by it and would thus work a great injustice to the mortgagors; that the facts alleged in the bill of complaint did not justify the issuance of a restraining order or an injunction, or the appointment of a receiver; that the plaintiffs were not creditors but stockholders; that the plaintiffs' contracts did not create a lien in their favor;

That plaintiffs were not entitled to withdraw funds or demand the payment of their certificates, basing this contention upon the ground that they had failed and neglected to carry out their contracts with the defendant corporation and that the corporation had kept and performed its contracts with the plaintiffs according to the conditions therein and the by-laws of the association, which the defendant corporation alleged specifically provided that not more than one half of the fund received by the Association in any one month should be applicable to the payment of withdrawing members and that withdrawals should be paid in rotation according to priority of notice, and that there were other stockholders of the Association who had applied prior in time to the filing

Petitioner Nealon's Exhibit No. 4—(Cont.)
(Deposition of William H. Burges.)

of the application of plaintiffs who had not been paid in rotation or whose turn for payment had not been reached for the reason that sufficient funds of the Association had not been received applicable to the payment of claims of withdrawing members, and contended further that under the laws of Utah not more than one half of the monthly receipts in any one month might be applied to the withdrawals for the month without the consent of the board of directors of the corporation.

The defendant corporation also denied insolvency, mismanagement, waste of assets, and other material allegations [150] of the complaint, and supported their contentions by briefs and oral argument of able counsel for defendant.

XI

Assume that said Thomas W. Nealon and his co-solicitor met the contentions of the defendant by extensive briefs and oral arguments, contending that:

The court had jurisdiction to appoint a receiver of a foreign corporation at the instance of creditors where fraud and insolvency were involved; that the Bank Commissioner of Utah was appointed under the police power of that state and the police power did not extend beyond the territorial jurisdiction of that state;

That the mortgages held by the corporation were straight mortgages that provided a definite term

Petitioner Nealon's Exhibit No. 4—(Cont.)
(Deposition of William H. Burges.)
of payment and were not mortgages of such a character whose due date would be accelerated by the failure of the corporation; that the facts alleged, namely insolvency, mismanagement and dissipation of the assets were sufficient grounds for the relief sought and were fully supported by affidavits filed in this proceeding;

That the plaintiffs were not stockholders but creditors; that the contracts created equitable liens and a trust of which the federal courts of equity could and would take jurisdiction; that under defendant's construction of the contracts, the obligations to plaintiffs and those similarly situated would never be payable and that such construction would be a fraud upon such creditors;

That the verified complaint showing insolvency and the affidavits filed in support thereof made a *prima facie* case which could only be refuted by a showing of solvency, the production of the books and records of the corporation and a complete disclosure of the truth of its condition in the pleadings of the defendant corporation. [151]

XII.

Assume that upon the hearing of the petition for the appointment of the receiver and upon the motion of defendant to modify the restraining order, Thomas W. Nealon, being unable to be present, was represented by Joseph M. Nealon, a member of the bar of 32 years experience, now Chief Justice of the Court

Petitioner Nealon's Exhibit No. 4—(Cont.)
(Deposition of William H. Burges.)
of Civil Appeals of the Eighth Supreme Judicial District of Texas, and who at this particular time was of counsel for the trustee in bankruptcy of the Bay Cities Building & Loan Association in the Federal Courts of Los Angeles, California, in which work he had become familiar with the issues involved in this litigation, and said Joseph M. Nealon later assisted said Thomas W. Nealon by furnishing him with briefs and authorities which were of considerable service in the further presentation of the issues involved.

XIII.

Assume that after various oral arguments and the filing of briefs going to the question of law raised by the motions and demurrers of the defendant, and while the court had the same under consideration, but before the Court had given its decision in the matter, J. A. Malia, then Bank Commissioner of the state of Utah, did, on the 26th day of September, 1933, file a petition for leave to intervene in this proceedings for the purpose of having the books, records and movable assets of the corporation removed to the state of Utah, upon the alleged ground that he could have closer supervision over the affairs of the corporation, he alleging in his motion or petition for leave to intervene that the defendant corporation had since 1921 conducted a successful building and loan business. This allegation was made notwithstanding the fact that he then had in his possession full information in the records of his office of the insolvency of

Petitioner Nealon's Exhibit No. 4—(Cont.)
(Deposition of William H. Burges.)
the corporation and mismanagement of its affairs, and [152] notwithstanding the fact that he had notice for months previously of the filing of this suit and of the filing of the affidavits in connection therewith which directly called to his attention the true condition of the defendant corporation.

He further alleged that the corporation being a Utah corporation, he was vested with exclusive jurisdiction over the affairs of the defendant to the exclusion of the United States Court for the Federal District of Arizona or any other court, and prayed for an order of the court permitting him to file his complaint in intervention and to be forthwith entered as intervenor in said action, and for other and further general relief. The purpose of said intervention was to divest the United States Court for the Federal District of Arizona of all control of the assets of the defendant corporation which were then in the constructive possession of said Court, and to remove such assets beyond the jurisdiction of said court. The petition was verified by D. M. Draper, a member of the Bar of the State of Utah and assistant attorney general of that state, and he represented said Malia as Bank Commissioner in presenting said petition to the Court.

XIV.

Assume that upon the presentation of the petition of said Malia, said Thomas W. Nealon strongly opposed the same and alleged that there had been no compliance with the Federal equity rules governing

Petitioner Nealon's Exhibit No. 4—(Cont.)

(Deposition of William H. Burges.)

intervention, and among other points, alleging that the jurisdiction of the court in the premises had not been admitted as required by such rule. The Court sustained the position of said Thomas W. Nealon and refused to recognize the intervention by Malia. Thereupon an application was then made to the Court to allow Mr. Draper to appear as counsel *pro hac vice* for the defendant corporation and he then associated himself with the other counsel representing the defendant cor- [153] poration as one of counsel for the defendant resisting the complaint of the plaintiffs.

XV.

Assume that Mr. Draper argued strongly and ably against the right of the Court to appoint a receiver, as against the wishes of the Bank Commissioner of Utah, and the Court granted Mr. Draper further time to amend his petition or show any right to intervene in the proceedings; that after the hearing on September 26, 1933, to wit on October 3, 1933, the solicitors for the plaintiffs filed formal written motions to dismiss the petition of Malia for leave to intervene and supported the same by points and authorities, which were duly served upon said Malia as well as upon the defendant; that the Bank Commissioner did not avail himself of the opportunity granted him by the Court to amend his petition to intervene, and that on the 3rd day of January, 1934, his petition was dismissed.

Petitioner Nealon's Exhibit No. 4—(Cont.)
(Deposition of William H. Burges.)

XVI.

Assume that after due consideration by the Court on the various briefs and oral arguments made, the Court denied defendant's motions and overruled their demurrers, thus settling all the law questions; that the cause then awaited the convenience of the Court for the purpose of setting a date for the hearing of the cause.

XVII.

Assume that this was the situation that existed a few days prior to the 17th day of March, 1934, when said J. A. Malia, with the consent and acquiescence of M. E. Waddoups took possession of the assets of the defendant corporation (which was then in the physical possession of the corporation), notwithstanding the constructive possession of said assets was in said Court; that A. J. Bruneau, secretary and general manager of the defendant corporation protested the seizure of these [154] assets without the Court's consent, but without avail; that Malia also attempted to secure possession of the moneys of the corporation deposited in the Valley National Bank of Phoenix and the Phoenix National Bank, but that each of these institutions refused to turn over possession of such funds to him; that following this refusal Malia then appeared in the United States District Court and filed an amended petition for leave to intervene as Bank Commissioner of the State of Utah, on March 23, 1934, seeking to procure an order from said Court disclaiming any right to appoint a re-

Petitioner Nealon's Exhibit No. 4—(Cont.)
(Deposition of William H. Burges.)
ceiver or take possession of the assets of the defendant and sought an order that would destroy the force and effect of the restraining order issued by the court on April 18, 1933, which was still in effect, he being represented at this time by Messrs. Moore & Shimmel, eminent attorneys of Phoenix; that Malia based his right to intervene upon the allegation that he had theretofore, on, to wit, March 17, 1934, seized the assets of the defendant corporation in Utah and that he had prior to the time of the filing of said petition procured an order from the state district court in Utah authorizing him to take possession of all of the assets of the corporation, and that he claimed title to the assets upon the theory that he was so vested by the terms of the Utah statutes.

XVIII.

Assume that Thomas W. Nealon and his co-solicitor vigorously opposed the contention of the Bank Commissioner of Utah and filed a petition for the immediate appointment of a receiver and procured an order to show cause thereon; that they alleged that said Malia had failed, neglected and refused theretofore to take action to protect the investors in said Association, although he was fully informed, or by reasonable diligence could have been informed of the unsafe and unsound condition of the defendant corporation and that with all this [155] information before him, he did on the 26th day of September, 1933, assert in a written pleading filed in said Court that

Petitioner Nealon's Exhibit No. 4—(Cont.)
(Deposition of William H. Burges.)
the defendant corporation "since 1921 had conducted a successful building and loan business throughout the several states of the Union under the supervision of the Bank Commissioner of the state of Utah", and also alleged that from the records and files in the cause it appeared that he was negligent in his supervision of the affairs of the corporation and lacked the qualities necessary to a proper administration of its affairs, and that he had for a long period of time suffered said corporation to continue business in an unsafe and unsound condition when he had access to their records and could have by the use of ordinary diligence discovered the condition of its affairs.

XIX.

Assume that the defendant corporation and Malia filed an answer and objections to this petition of plaintiffs for the immediate appointment of a receiver and strenuously fought the granting of the petition in the premises, and that in these proceedings Malia was further represented by the members of the Bar of Salt Lake City, Messrs. H. Van Dam and H. L. Mulliner, in addition to said Messrs. Moore & Shimmel.

XX.

Assume that the issues were heard by the Court on the 10th day of April, 1934, at which time evidence was introduced and exhaustive arguments made, and that from the bench the Court made the following order:

Petitioner Nealon's Exhibit No. 4—(Cont.)
(Deposition of William H. Burges.)

“I will enter an order of record in this case at this time directing Mr. Malia to leave all the papers and records and files and the property of the Building and Loan Association in the state of Arizona and not remove them. That goes to all assets, books, records, files, money and everything else that belongs to this association; that they do not be removed from this state. That order is in effect until this matter is disposed of or until further order of the Court;”

and that the cause was ordered submitted on briefs, and said [156] Thomas W. Nealon was directed to prepare a brief upon the particular point involved as to the rights of the Bank Commissioner in Utah in the premises, and that this was the first occasion in the history of the law, so far as he is informed, in which the question of the unfitness of a state official to administer the assets of a delinquent corporation had been raised as a ground for the appointment of a receiver, and proved an important question in the subsequent conduct of the litigation.

XXI.

Assume that on the 20th day of April, 1934, the Court granted the petition of plaintiffs for the appointment of a receiver pendente lite, appointing Hon. Henry S. McCluskey as such receiver, and continued in force the injunction and restraining order theretofore entered by it; and that the receiver qualified on the date of his appointment and demanded

Petitioner Nealon's Exhibit No. 4—(Cont.)
(Deposition of William H. Burges.)

possession of the assets, but that his demand was refused.

XXII.

Assume that immediately upon the entering of the interlocutory decree appointing Henry S. McCloskey, Receiver, notice of appeal was given by the defendant corporation and J. A. Malia, Bank Commissioner of Utah, which appeal was granted by the court and supersedeas bond fixed in the sum of \$35,000.00; and that James R. Moore, solicitor for the proposed appellees, together with said Thomas W. Nealon then appeared before the Honorable Fred C. Jacobs, the judge who tried the cause, and settled the statement of evidence and the appeal was duly perfected.

XXIII.

Assume that in June of 1934 and before the case was at issue in the Circuit Court of Appeals the defendant corporation filed a motion for modification of the injunctive order made by the United States District Court for the Federal District of Arizona, and also filed a brief therewith. Assume that this [157] was opposed by Thomas W. Nealon and his co-solicitor, who filed an answer and brief thereto; and that the Circuit Court of Appeals denied this motion of the defendant corporation.

XXIV.

Assume that the appellants filed their brief on appeal in due season contending that the appellees were

Petitioner Nealon's Exhibit No. 4—(Cont.)
(Deposition of William H. Burges.)
stockholders (the certificates labeled them as such); that the bill of complaint was without equity; that the court abused its discretion in appointing a receiver; that the appellees had no lien upon the assets of the corporation; that the Bank Commissioner of Utah was the statutory liquidator and vested with title of the Association's assets, and that under the full faith and credit clause of the Constitution the court was bound to recognize the title of the Bank Commissioner of Utah to the assets of the corporation; that the court will not appoint a receiver at the suit of an unsecured, nonjudgment creditor, and that the court should not interfere with the internal affairs of a foreign corporation.

XXV.

Assume that Thomas W. Nealon and his co-solicitor filed their answering brief thereto within the time required by law contending:

That the labeling of the certificate as stock did not make it such, and the instrument itself created the relation of debtor and creditor between the contracting parties; that the facts stated in the complaint showed appellee's right to equitable relief and that they were holding equitable liens and that the defendant was false to its trust; that the facts presented to the court by the verified petition of plaintiffs, and otherwise, were such as to require it to grant the injunctive relief and appoint a receiver; that the contracts between appellants and appellees created equitable liens in favor of appellees and the [158] as-

Petitioner Nealon's Exhibit No. 4—(Cont.)
(Deposition of William H. Burges.)

sets of the corporation were a trust fund to secure the repayment of the money borrowed from the appellees and those similarly situated; that the Bank Commissioner of Utah was not vested with title to the assets of the corporation; that the appointment of a receiver is an ancillary remedy which a federal court of equity will grant to a lienholding creditor in a proper case; that the appellees and those similarly situated being creditors and not stockholders the issue was not one of internal management but the right of creditors to prevent the waste of a trust fund; that Malia had no rights in the premises, but if he ever had any he had lost same by his negligence and failure to protect the rights of all lienholding creditors, he having ample information in his own office of the wrongful conduct of the defendant corporation and its insolvency.

XXVI.

Assume that while this matter was at issue in the Circuit Court of Appeals the Supreme Court of the United States on the 4th day of February, 1935, handed down four decisions involving the rights of statutory liquidators, and that the appellants thereupon filed a supplemental brief in the Circuit Court of Appeals based upon the theory that these decision required a reversal of the decree rendered in the District Court. In opposition to this contention said Thomas W. Nealon and his co-solicitor filed their supplemental brief.

Petitioner Nealon's Exhibit No. 4—(Cont.)
(Deposition of William H. Burges.)

XXVII.

Assume that the cause was argued at San Francisco on the 28th day of February, 1935, by Thomas W. Nealon, his co-solicitor being present in Court on that occasion; that the matter was taken under advisement and on the 5th day of August, 1935, the Circuit Court of Appeals rendered its decision in which it affirmed the interlocutory decree of the United States District Court appointing Henry S. McCluskey as receiver and issuing an [159] an injunction pertaining to the assets of the corporation, and in its opinion the Circuit Court of Appeals said that the Court below "might well have arrived at the conclusion that the corporate chaos had been a matter of years, rather than months, and that therefore the Bank Commissioner of Utah in whose office admittedly there were filed reports containing 'full information as to the status of the defendant corporation', had shown himself not to be a proper person to husband the dwindling assets of the failing Association."

XXVIII.

Assume that the appellants thereupon filed motion for the purpose of having certain papers in the District Court sent up to the Circuit Court of Appeals; that this motion was opposed by Thomas W. Nealon and his co-solicitor, and that certiorari therefor was subsequently denied.

Petitioner Nealon's Exhibit No. 4—(Cont.)
(Deposition of William H. Burges.)

XXIX.

Assume that the appellants then filed their motion for rehearing and this was also denied; that they thereupon filed their petition for writ of certiorari in the Supreme Court of the United States and their briefs thereon, in which they made the contentions that the Circuit Court of Appeals had denied full faith and credit to the statutes of Utah and decided a federal question in conflict with the decision of the United States Supreme Court in the case of *Clark v. Williard*, 292 U.S. 112 and 294 U.S. 211; and that in affirming the decision of the District Court appointing a receiver and displacing the Bank Commissioner of Utah, its decision was contrary to the four decisions hereinbefore mentioned which involved the rights of statutory liquidators and which had been rendered while this case was at issue in the Circuit Court of Appeals.

XXX.

Assume that Thomas W. Nealon and his co-solicitor filed [160] their opposing briefs, contending that the decision of the Circuit Court of Appeals was not in conflict with the cases cited, that no federal question or other question of public importance which had not theretofore been settled by the Supreme Court was involved, and that there was no departure from the accepted and usual course of judicial proceedings in the court's decree. The petition for writ of certiorari was denied by the Supreme Court on November 11, 1935.

Petitioner Nealon's Exhibit No. 4—(Cont.)
(Deposition of William H. Burges.)

XXXI.

Assume that on the 29th day of September, 1936, the suit was tried upon the merits, Thomas W. Nealon and Elizabeth G. Monaghan appearing for the plaintiffs, and James R. Moore, Esq., of the firm of Moore & Shimmel appearing for the defendant; that after hearing the evidence the Court directed that findings of fact and conclusions of law be prepared by counsel for plaintiffs and that decree be entered for the plaintiffs.

XXXII.

Assume that on towit, the 5th day of January, 1937, the District Court of the United States for the District of Arizona made its decree in which it among other things, established the liens of the creditors, affirmed the appointment of Henry S. McCluskey as receiver, and made the injunction theretofore rendered permanent, thereby establishing the rights of said lienholding creditors who desired to come in and obtain the benefits of the judgment upon the conditions named in the invitation contained in the complaint, namely, that they should bear their proportionate share of the expenses of the litigation, including attorneys' fees; that said decree further secured the trust fund wherever situated to the plaintiffs named in said suit and those similarly situated, said decree providing and ordering that deeds and other conveyances to the property of the corporation wherever situated should be executed by the corporation

Petitioner Nealon's Exhibit No. 4—(Cont.)
(Deposition of William H. Burges.)

[161] to the receiver as trustee for the benefit of all these parties, said decree having been obtained after personal service and appearance by the corporation; that this provision was made for the reason that a receiver appointed by a United States court is not vested with title, but such court has power to compel the defendant to execute deeds and conveyances to its property wherever situated when the same is trust property; that such decree is binding upon all situated similarly to the named plaintiffs, regardless of any active participation in the suit.

XXXIII.

Assume that the burden of the conduct of this litigation as described herein and the other proceedings in connection with the recovery and preservation of the trust funds fell upon said Thomas W. Nealon, as well as the investigations and research work necessary to the successful conduct of such litigation; that the labor was arduous and difficult, the results of the litigation by no means certain and the hazard great;

That he had great difficulty in procuring the evidence to establish the facts for the reason that the books and records were in the exclusive possession of the officers, directors and employees of the defendant corporation, who, as well as their attorneys, refused access thereto to your petitioner and his associate solicitor, and were hostile to the plaintiff, and that it

Petitioner Nealon's Exhibit No. 4—(Cont.)
(Deposition of William H. Burges.)

thus became necessary for him to obtain his information from indirect sources.

That this necessitated an examination of the records of the Arizona Corporation Commission and the Arizona Banking Department, so far as they pertained to the affairs of this corporation; investigation into the records of the state courts in foreclosure proceedings and other litigation in which the defendant corporation was involved; interviews with other [162] attorneys who had claims against the defendant and allied corporations; procuring advertising matter and printed statements of the corporation as far as they could be obtained by diligent search;

That he attended upon trials in the state courts where proceedings were pending against the corporation which held the corporate control of the defendant, so that he might obtain the evidence necessary to establish the allegations of the complaint of the plaintiffs; that he also had interviews with representatives of the federal government who had come to his office in search of evidence against said M. E. Waddoups, and who in turn furnished him with valuable information.

That it was necessary to employ clerical help in order to obtain copies of the reports of said Association filed in the office of the Bank Commissioner of Utah annually from the year 1921 up to and including the year 1932, and it was necessary to employ certified public accountants to work with him and his

Petitioner Nealon's Exhibit No. 4—(Cont.)
(Deposition of William H. Burges.)
co-solicitor in order to break down and analyze these reports for the purpose of obtaining the evidence therefrom to establish the insolvency of the corporation material to the controversy and to establish the fraud and mismanagement of its directors, as well as the negligence of the Bank Commissioner in permitting the corporation to do business when by the reports on file in his office and an examination of the affairs of the corporation, he knew, or could have known by the use of ordinary diligence, the insolvency of said corporation; that he sent for and obtained the records of the suit filed by Daniel Alexander against M. E. Waddoups hereinbefore mentioned, in which was disclosed the secret contracts under which the unlawful commissions to the amount of several hundred thousand dollars had been unlawfully paid to Waddoups; that the proof of the insolvency of the defendant corporation and the misconduct of its officer had to [163] to be wrung from these published reports and was a time consuming and laborious process.

That in order to prove the facts as set up in the complaint it was necessary not only to have the records mentioned from the office of the Bank Commissioner of Utah, together with supporting affidavits, but also outside affidavits showing the excessive cost of operation, and procured affidavits showing admissions of M. E. Waddoups that he received a commission of 3% on all such items and affidavits showing payments to other parties for commissions.

Petitioner Nealon's Exhibit No. 4—(Cont.)
(Deposition of William H. Burges.)

That said Thomas W. Nealon made an examination of the statutes of Utah and these disclosed that corporations similar in nature to the defendant corporation were required to file verified annual statements with the Banking Department of Utah, and that it was the duty of the Bank Commissioner of Utah to make periodical examination of the affairs of the corporation.

XXXIV.

Assume that with this information before him, said Thomas W. Nealon conceived the idea that the defendant corporation could not file such reports for a period of eleven years without revealing the true condition of the corporation, and that a breakdown of such reports by competent accountants familiar with that line of business would necessarily reveal, when taken in connection with other evidence existing and available, that the corporation was and had been insolvent for years; that its expenses had exceeded its income for many years and that these statements would probably reveal the misconduct of the officers and directors of the corporation, as well as the mismanagement of its affairs and waste of its assets; that at the instance of said Thomas W. Nealon copies of these reports for eleven years were procured from the office of the Bank Commissioner of Utah [164] and affidavits were procured from persons who made these copies to the effect that they were correct; that the reports themselves had been sworn to by officers of the corporation at the time they were filed; that

Petitioner Nealon's Exhibit No. 4—(Cont.)
(Deposition of William H. Burges.)
upon procuring these, he and his co-solicitor consulted with Messrs. Willis H. Plunkett and James A. Smith, Certified Public Accountants, familiar with accounting in all its branches, including building and loan accounting, and submitted these reports to them, together with the contracts held by plaintiffs for the purpose of having such reports analyzed and broken down; that as a result of such consultation and such work upon the part of Messrs. Plunkett and Smith and the analysis and breaking down of such reports in connection with other evidence assembled by the solicitors for the plaintiffs, he procured sufficient evidence to establish a *prima facie* case to obtain the relief prayed for in the bill of complaint.

XXXV.

Assume that by reason of the fact that many novel questions of law were involved, it was necessary for Thomas W. Nealon to make an exhaustive study of the applicable principles of law and of the authorities which would sustain those principles upon a hearing in court and prove to the court the rights of the plaintiffs to the relief they sought; that it was necessary to make an exhaustive study of the statutes of Utah to ascertain whether there was anything in these statutes, which as a matter of public policy of that state would render contracts of the nature of plaintiffs and those similarly situated, void in so far as they attempted to create a lien, and this investigation enabled Thomas W. Nealon to establish to the

Petitioner Nealon's Exhibit No. 4—(Cont.)

(Deposition of William H. Burges.)

satisfaction of the various courts the validity of these liens; that much study was necessary also to an interpretation of the statute laws of California, Oregon, Idaho and Wyoming, in which states this corporation was doing business. [165]

XXXVI.

Assume that novel and difficult questions of law were involved in this litigation, questions that had not been definitely determined until the decision of the Supreme Court in this case, and to properly present these questions and overcome the contentions of the defendant corporation in opposition thereto, necessitated an immense amount of research work; that the applicable principles of law had not at the time the complaint was filed been determined by the Supreme Court of the United States nor by any of the federal courts of appeal and were therefore uncertain.

Assume further that the contention that the United States Court had a right to appoint a receiver of a building and loan association where the statutes at the domicile of the corporation provided for a liquidator by a state official, when the state official had shown himself unfit to administer the affairs of the delinquent corporation, and when the statutes under which he was appointed were inadequate to give this protection to litigants, a question raised for the first time in the annals of law so far as said Thomas W. Nealon is aware,

Petitioner Nealon's Exhibit No. 4—(Cont.)
(Deposition of William H. Burges.)
was upheld by the Circuit Court of Appeals, and for the first time that right was definitely settled and the principle established by the denial of the writ of certiorari by the Supreme Court.

Assume further that the contention of Thomas W. Nealon that the relation of debtor and creditor was created by the particular contracts and that a trust and lien was created as against the Building and Loan Association on behalf of the holders of the certificates, also raised for the first time, was established definitely, and in its decision the Circuit Court of Appeals definitely held that despite the label attached to the certificates, the instruments were not stock, but created [166] the relation of debtor and creditor, and that the language of the contract was sufficient to create an equitable lien in favor of such creditor, this also being established for the first time.

Assume further that although prior to this time it had been established that a building and loan association could borrow money and issue its promise to pay in the form of investment certificates, it had not been held that a building and loan association could pledge or mortgage its assets for the purpose of securing loans so obtained, until the final decision in this case.

Assume that another novel question involved was the force and effect of a statute of the state under which a corporation was organized when that state permitted a building and loan association to remove

Petitioner Nealon's Exhibit No. 4—(Cont.)

(Deposition of William H. Burges.)

its principal office to another state and carry on business in a foreign jurisdiction.

Assume that in the course of his research work,, Thomas W. Nealon examined and analyzed more than six hundred cases bearing upon the issues involved, as well as the statutes of the various states and many text books, this extensive research being necessary by reason of the numerous novel questions of law involved.

XXXVII.

Assume that the major portion of the time of said Thomas W. Nealon for a period of more than three and one half years was devoted to labor for and on behalf of the plaintiffs named and those similarly situated in the study of the principles of law governing the case, the analysis of the facts involved and assembling of evidence to support the allegations of the complaint, the preparation of pleadings in the case and obtaining the various orders and decrees in this suit, and in defending the decree of the lower court in the Circuit Court of Appeals and Supreme Court [167] of the United States, and the preparation as to the law and facts necessary to a successful conclusion of the case; that the necessary work for the preparation of the various briefs in the United States District Court, the Circuit Court of Appeals and the Supreme Court consumed more than 2930 hours, or 586 court days,— this exclusive of the time spent

Petitioner Nealon's Exhibit No. 4—(Cont.)
(Deposition of William H. Burges.)

in preparation of the necessary pleadings filed in the District Court and in miscellaneous research work, examinations made of the records of the Corporation Commission and State Banking Department, attendance on hearings in other courts wherein evidence against the said corporation was developed, attendance at hearings before the United States District Court and Circuit Court of Appeals at San Francisco, examination and study of pleadings and briefs of the opposition, conferences with attorneys for the corporation and the Bank Commissioner of Utah, conferences with Home Owners Loan Corporation officials, and conferences with attorneys for intervenors, and various creditors of the defendant corporation.

XXXVIII.

Assume that the office expenses of said Thomas W. Nealon for the 42 months during which he worked upon said case prior to the time when the receiver obtained actual possession of the assets of said Intermountain Building & Loan Association within the state of Arizona was \$13,739.35.

XXXIX.

Assume that no compensation whatever has been received by said Thomas W. Nealon for his professional services rendered in said litigation, and that no agreement or understanding exists for any compensation to be paid to him, other than such as

Petitioner Nealon's Exhibit No. 4—(Cont.)
(Deposition of William H. Burges.)
may be allowed to him by the Court for his services in the premises, and that his compensation was entirely dependent upon the successful outcome of said litigation as described in this [168] hypothetical question.

LX.

Assume that 2,792 of the creditors of the Intermountain Building & Loan Association, an Utah corporation, situated similarly to those of the plaintiffs named in said litigation, elected to avail themselves of the benefits of the efforts of said Thomas W. Nealon and of the decree obtained.

LXI.

Assume that as a result of the professional services rendered in the litigation described in this hypothetical question there was recovered for the benefit of the plaintiffs named and all others similarly situated, a trust fund consisting of cash, bonds, mortgages and real property of the value of \$2,119,662.82.

Assume further that the trust fund established by the decree of the United States District Court for the District of Arizona consisted of assets within the state of Arizona of a value of \$1,349,613.35, and of assets outside of the state of Arizona of a value of \$770,049.47.

Assume further that the said decree removed the Intermountain Building & Loan Association as a delinquent trustee of said trust funds and

Petitioner Nealon's Exhibit No. 4—(Cont.)
(Deposition of William H. Burges.)
directed conveyances of all of the assets so recovered to be made the receiver appointed by the Court as trustee for the plaintiffs named in said suit in the United States District Court and all creditors similarly situated.

Assume further that all of the assets of the corporation in Arizona came into the actual physical possession of a receiver appointed by said United States District Court, who is now administering the receivership estate for the benefit of said plaintiffs named and all others similarly situated; that the portion of said trust fund situated in the states of Wyoming, Idaho and Utah are being administrated in ancillary proceedings in [169] said states in aid of the primary receivership in this state, and that suits are now being prosecuted in the states of California and Oregon to enforce in those states the decree of this Court referred to in this hypothetical question.

Now, Mr. Burges taking into consideration the professional standing and ability of Thomas W. Nealon, the importance of the litigation and the matters covered in this hypothetical question just presented, the fact that any fee to be received was based upon the contingency stated in the hypothetical question, the amount of labor performed by Thomas W. Nealon as set out in this hypothetical question, the amount involved in the litigation, the novel questions of law to be determined therein, the applicable principles of which had not thereto-

Petitioner Nealon's Exhibit No. 4—(Cont.)
(Deposition of William H. Burges.)

fore been settled by the courts, the hazard involved in proving the facts of the case, the nature of the case as a class suit, the fact that 2,792 of the creditors of the corporation similarly situated to the plaintiffs named have accepted the benefit of the decree obtained, and the results obtained, what, in your opinion, would be a reasonable compensation for the services of Thomas W. Nealon in said litigation? [170]

A. It is my opinion that a reasonable fee for the conduct of the litigation set forth in the question to which this is an answer would be ten per cent of the amount recovered for the use and benefit of your clients.

Q. Give the reasons for your opinion, Mr. Burges.

A. In forming the opinion I have just expressed I have taken into consideration what I always take into consideration in my own practice or when examined as to any one else's services, that is to say, the character and ability of the lawyer who has rendered the service, the amount involved in its general aspect. I give special attention and consideration to the net result to the clients. I take into consideration the character of the work, the complexity or simplicity of the questions involved, the novelty or commonplaceness of the questions involved, the effect that long continued, diligent application to one matter of that kind has on the general practice of the man doing the work. I think that has to be taken into consideration as it is my

Petitioner Nealon's Exhibit No. 4—(Cont.)
(Deposition of William H. Burges.)
experience that work of that kind indicated by your question has a very decided effect on the rest of your work during the period covered by it and, furthermore, always taking into consideration the hazard of uncompensated services where what you get is dependent entirely upon the success of your efforts in serving your clients. They are bound for nothing if you do not win, and, therefore, ought to pay proportionately when you do. I always take into consideration the general line of compensation that lawyers get and the difference in the compensation in different classes of litigation. In my experience the ordinary run of law suits on a promissory note provides for ten per cent if collected. Certainly nothing less than that occurs to me to be a reasonable fee no matter how large the amount is, [171] if it results in the sum contended for being collected either in whole or in substantial part. Therefore, while many are served in a class suit of this kind and large amounts are recovered it is only through a large amount of work competently rendered and the cost to the individual is even less than it would be on a simple sort of a promissory note, taking into consideration what he gets out of it. Generally speaking that is the way I arrive at fees for myself or anybody else and on that and believing that is the right way to do, I think ten per cent of the amount involved is a moderate or reasonable fee in the case.

WM. H. BURGES,

WILLIAM H. BURGES. [172]

Petitioner Nealon's Exhibit No. 4—(Cont.)
(Deposition of William H. Burges.)
State of Texas,
County of El Paso

Be it known that I took the annexed and foregoing deposition pursuant to the annexed Notice; that I was then and there a duly appointed, qualified and acting Notary Public in and for the County of El Paso, State of Texas; that by virtue thereof I was authorized to administer an oath; that said William H. Burges, the witness before testifying was duly sworn to testify to the whole truth and nothing but the truth; and that the testimony of said witness was reduced to writing by me, and was carefully read over to him before he signed the same; that there was present at the taking of said deposition, in addition to the witness, Thomas W. Nealon, Petitioner; that said witness signed said deposition and wrote his name upon each piece of paper thereof upon which any portion of his testimony is written.

I, also, certify that I, Rose B. Greenawalt am one and the same person as Mrs. A. C. Greenawalt named in the Notice.

Petitioner Nealon's Exhibit No. 4—(Cont.)
(Deposition of William H. Burges.)

In witness whereof I have hereunto set my hand and the official of my office at El Paso, Texas, this 14th day of December, 1937.

[Notarial Seal] ROSE B. GREENAWALT,
Notary Public in and for El Paso County, Texas.

My commission expires May 31, 1939. [173]

[Endorsed]: Petr. Nealon's Exhibit No. 4 Admitted and Filed Dec. 20, 1937. Edward W. Scruggs, Clerk United States District Court for the District of Arizona. By Wm. H. Loveless, Chief Deputy Clerk. Case No. E-268 Phx., Gallegos vs. Inter-mountain. [178]

PETITIONER NEALON'S EXHIBIT No. 5

[Title of District Court and Cause.]

DEPOSITION OF SAMUEL L. PATTEE

Be It Remembered, That pursuant to the Notice hereto annexed, and at the office of Darnell, Pattee & Robertson, No. 410-413 Valley National Bank Building, Tucson, Arizona, before me, John W. Walker, a Notary Public in and for the County of Pima, State of Arizona, personally appeared Samuel L. Pattee, a witness produced on behalf of Thomas W. Nealon, Petitioner in the above entitled action now pending in said Court, who being by me first duly sworn was then and there examined and interrogated by said Thomas W. Nealon, Petitioner;

Petitioner Nealon's Exhibit No. 5—(Continued)
(Deposition of Samuel L. Pattee.)

that no person attended the taking of said deposition in behalf of any other person interested in said cause, and that the said deposition was in the words and figures following, to wit:

SAMUEL L. PATTEE,

Being first duly sworn according to law, deposes and says:

Examination

By Mr. Nealon:

Q. State your name please.

A. Samuel L. Pattee. [183]

Q. And your profession?

A. Lawyer.

Q. How long have you been practicing law?

A. I was admitted to the bar first in 1891, and have been practicing in Arizona since April, 1899.

Q. And your place of residence?

A. Tucson, Arizona.

Q. And you are a former Judge of the Superior Court of Arizona, for the County of Pima?

A. Yes sir, six years; from 1915 to 1922.

Q. And you have, by request, sit in cases in the Supreme Court many times, have you not?

A. I have several times.

Q. You are a member of the bar of the Federal Court?

A. Yes sir.

Q. Of the United States, for the District of Arizona?

A. Yes sir.

Petitioner Nealon's Exhibit No. 5—(Continued)
(Deposition of Samuel L. Pattee.)

Q. And you have practiced before the various Federal Courts of the state?

A. Yes sir.

Q. In both law and equity cases?

A. Yes sir in both since Arizona became a state, and before that in the Federal Courts when the District Courts had federal jurisdiction.

Q. During the territorial days in Arizona?

A. Yes sir.

Q. Are you familiar with the rates of attorneys' fees prevailing throughout Arizona?

A. I think so. I have practiced in both ends of the state; eight years in Prescott and the rest of the time here.

Q. Do you know the petitioner, Thomas W. Nealon?

A. I do. [184]

Q. How long have you known him?

A. I think I have been acquainted with him about twenty years.

Q. Twenty years any way?

A. Twenty years, yes.

Q. Please state your knowledge of the standing of the petitioner as a member of the bar here?

A. I regard him as a lawyer of excellent ability—of a high order of ability, and as far as his personal standing is concerned, on a par with anybody in the state.

Q. You have read the opinion of the Circuit Court of Appeals in the case of Gallegos and oth-

Petitioner Nealon's Exhibit No. 5—(Continued)
(Deposition of Samuel L. Pattee.)
ers, versus Intermountain Building and Loan Association?

A. Yes sir, I have.

[Clerk's note: hypothetical questions propounded to witness Samuel L. Pattee are omitted from this transcript pursuant to stipulation filed April 9, 1943.] [185]

A. Not less than one hundred thousand dollars.

Q. Now, give your reasons for your opinion, Judge?

A. I have read the hypothetical question presented to me; I have read the opinion of the Circuit Court of Appeals of the Ninth Circuit, and I think I can surmise from the statement perhaps the questions that were presented to Mr. Nealon and encountered by him in the course of the litigation even beyond the scope of the hypothetical question and the opinion of the Court. I have been surprised at the variety and extent of involvement of the questions presented, and I can appreciate the immense amount of work that must have been done by Mr. Nealon to present the various matters to the United States District Court that resulted in the various orders and decrees he obtained, and the immense amount of work that must have been done in order to properly present the various questions to the Circuit Court of Appeals, and I take into consideration the highly satisfactory result received, the large amount involved, and the large amount which was retained, I might say, in the

Petitioner Nealon's Exhibit No. 5—(Continued)
(Deposition of Samuel L. Pattee.)

jurisdiction for the benefit of creditors, otherwise no one can tell what would have become of them, judging from the past conduct of those having charge, and one can easily surmise there would not have been anything left. Considering Mr. Nealon's standing at the bar, and the fact that he is one of the most thorough and careful lawyers that I know of and the fact that when he goes into a subject, he exhausts it, as I know from experience in opposing him in litigation, all of those matters and the general run of the question, and the services performed, and the work that must have been done which the hypothetical question probably does not set forth, so I would say that Mr. Nealon was entitled, at a fair basis, to ten per cent of the amount recovered, that would have been much more than I have given him as the value of the services, but I put it at a [186] figure which I think I would do if I was sitting in a court and passing upon the same.

SAMUEL L. PATTEE.

State of Arizona,
County of Pima—ss.

I, John W. Walker, do hereby certify that I am a duly appointed, qualified and acting Notary Public of the State of Arizona, in and for the County of Pima; that I am a duly qualified and practicing shorthand reporter.

That as such Notary Public I was present at the taking of the deposition of Samuel L. Pattee, at

Petitioner Nealon's Exhibit No. 5—(Continued)
(Deposition of Samuel L. Pattee.)

the office of Darnell, Pattee and Robertson, Nos. 410-413 Valley National Bank Building, in the City of Tucson, Pima County, Arizona, on Thursday, the 16th day of December, 1937, said deposition being taken on behalf of the petitioner, Thomas W. Nealon, in the cause of Guadalupe R. Gallegos, et al, v Intermountain Building and Loan Association, a corporation, being cause No. E-268, Phoenix, in the District Court of the United States, for the District of Arizona.

That said witness was by me first duly sworn to testify to the truth, the whole truth and nothing but the truth in the giving of said deposition. That I took down in shorthand the questions propounded to the witness, and his answers thereto, and that I afterwards reduced the same to typewriting, and the same were carefully read over to said witness before he signed the same.

In Witness Whereof, I have hereunto set my hand and affixed my Notarial Seal at Tucson this 16th day of December, 1937.

[Notarial Seal] JOHN W. WALKER,

Notary Public, Pima County,
Arizona. [187]

[Endorsed]: Petr. Nealon's Exhibit No. 5. Admitted and Filed Dec. 20, 1937. Edward W. Scruggs, Clerk, United States District Court for the District of Arizona. By Wm. H. Loveless, Chief Deputy Clerk. Case No. E-268 Phx. Gallegos vs. Intermountain. [188]

REPORTS AND ACCOUNTS OF HARRY W. HILL, RECEIVER

In the United States District Court for the District of Arizona

(SCHEDULE "A"—TRIAL BALANCE AS OF DECEMBER 31, 1939; SCHEDULE "B"—REAL ESTATE LOANS DECEMBER 31, 1939; SCHEDULE "C"—REAL ESTATE CONTRACTS DECEMBER 31, 1939; SCHEDULE "D"—REAL ESTATE OWNED DECEMBER 31, 1939; SCHEDULE "E"—REAL ESTATE SOLD DECEMBER 31, 1939; ATTACHED TO "REPORT AND ACCOUNT OF HARRY W. HILL, AS RECEIVER OF INTERMOUNTAIN BUILDING & LOAN ASSOCIATION, AN UTAH CORPORATION, AND PETITION FOR APPROVAL THEREOF, AND FOR ORDER FIXING DATE OF HEARING AND PRESCRIBING THE FORM OF NOTICE TO BE GIVEN." (FILED MARCH 20, 1940).

"SCHEDULE "A"—TRIAL BALANCE AS OF DECEMBER 31, 1939

DEBITS

Cash on hand & in banks—Arizona.....	\$ 286,408.35
Other States	59,391.08
Real Estate loans—Arizona.....	5,984.88
Other States	505,102.75
Real Estate Contracts—Arizona.....	53,099.62
Other States	61,647.18
Real Estate Owned—Arizona.....	363,312.68
Other States	589,745.35
Promissory notes & second mortgages—Arizona.....	3,346.72
Certificate loans—Arizona	130,388.06
Other States	194,312.77
Stocks, bonds & securities—Other States.....	161,575.00

Schedule "A"—Trial Balance as of December 31, 1939—(Continued)
Debits—(Continued)

Home Building & Loan Co. stock.....	51,000.00		
Deficiency Judgments	50,496.71		
Claims and judgments.....	173.64		
Accounts receivable—Arizona	1,831.80		
Other States	18,552.12		
Furniture and Fixtures—Arizona.....	11,421.86		
Other States	4,061.95		
Tax Suspense—Oregon	2,769.97		
Real estate operating expense—Arizona.....	116,529.42		
		11-30-35 to 3-31-37	4-1-37 to 12-31-39
Sewer & Water.....	\$ 1,467.38	\$	2,252.86
Repairs	4,937.87		6,793.80
Taxes & Assessments.....	19,095.67		44,720.16
Ins. & Title Expense.....	3,534.11		7,078.29
Rental & Misc Expense.....	2,218.20		3,867.65
Golf Course Expense.....	14,175.12		2,741.16
REO 4 and REO 32.....	319.67		647.42
Liability Ins. & Agents Bonds.....	1,906.74		773.50
	<hr/>		<hr/>
	\$ 47,654.76	\$	68,874.66
Real Estate Sales—Close Outs—Arizona.....			3,714.22
Other States			73.53

Schedule "A"—Trial Balance as of December 31, 1939—(Continued)
Debits—(Continued)

Real Estate Operating Expense—Idaho.....		11-30-35 to 3-31-37	4-1-37 to 12-31-39	1,994.80
Receiver's Liquidating Expense—Arizona.....				160,623.05
				[189]
Receiver's Salary	\$ 10,120.02			\$ 15,300.00
Legal Advisors	30,546.00			20,625.00
Plunket Audit Company.....	4,821.34			
Employees Salaries	21,740.19			27,965.63
Printing, Supplies & Stationery.....	1,446.59			728.71
Rent	3,325.00			4,765.40
Telephone, Telegraph, postage.....	1,698.18			1,169.16
Travel Expense	3,999.91			2,969.49
Office equip. & Maintenance.....	105.97			34.67
Courts Costs & Fees.....	893.19			710.14
Bonds	680.48			523.43
Insurance	838.03			739.42
Miscellaneous Items	414.93			677.75
Appraisal Fees	937.80			1,235.56
Social Security & Unemployment tax.....	266.76			1,344.30
	<hr/>			<hr/>
	\$ 81,834.39			\$ 78,788.66

Schedule "A"—Trial Balance as of December 31, 1939—(Continued)
Debits—(Continued)

Expense—California	\$ 3,115.40
Expense—Idaho	6,503.60
Expense—Utah	138.97
Expense—Oregon	1,837.71
Loss on Realization—Arizona	120,004.17
Loss on Realization—Other States.....	52,802.10
Real Estate Abandoned—Idaho.....	14,888.40
Receiver's Set Offs in Liquidation.....	17,429.81
	<hr/>
	\$3,054,277.67

CREDITS

Deficiency Judgments	50,747.70
Receiver's Income	162,762.46
	<hr/>
Rents	\$ 60,732.54
Golf Course	1,596.05
REO 4—Nebraska	698.40
Real Estate Loans—Interest.....	17,872.33
Real Estate Contracts—Interest.....	7,566.29
Warrants—Interest	61.72
	<hr/>
	\$3,054,277.67

vs. *Harry W. Hill*

Schedule "A"—Trial Balance as of December 31, 1939—(Continued)
Credits—(Continued)

226

Elizabeth G. Monaghan

	11-30-35 to 3-31-37	4-1-37 to 12-31-39	
HOLC & Postal Savings Bonds—Interest.....	\$ 1,092.23	\$ 10,689.53	
Notes & Second Mortgages, Interest.....	165.32	417.68	
Accts. Receivable & Judgments Int.....		1,053.60	
	<hr/>	<hr/>	
	\$ 62,074.32	\$ 100,688.14	
Interest—Other States			\$ 2,853.57
Real Estate Operating—Other States.....			2,352.63
Receiver's Income—Gain on Realization.....			7,053.68
General Suspense			862.75
Trust Accounts—Payments After Receivership.....			1,708.41
Accrued Int. Uncollected (12-31-33) Other States..			39,772.71
			[190]
Reserve for Maturities.....			150,029.91
Permanent Reserve Fund Stock.....			87,671.42
General Suspense			75,813.12
Stock Suspense—Certificates			31,565.22
Investment Certificates			2,045,036.44
Coupon Stock			79,342.01
Fully Paid Certificates.....			268,894.35
Extra Payments on Certificates.....			13,311.65
Pass Books Saving Certificates.....			34,499.64
			<hr/>
			Total \$3,054,277.67

SCHEDULE "B"—REAL ESTATE LOANS

December 31, 1939

No.	Memo	Balance 3-31-37	Balance 12-31-39
7	Active	\$ 13,116.25	\$ 5,984.88
19	Foreclosed—Deeds Secured	103,866.47	
2	Warranty Deed Taken.....	3,298.29	
24	Paid in Full.....	12,406.16	
1	Compromise Settlement	360.57	
—			
53		<u>\$133,047.74</u>	<u>\$ 5,984.88</u>

SCHEDULE "C"—REAL ESTATE CONTRACTS

December 31, 1939

No.	Memo	Balance 3-31-37	Balance 12-31-39
1	Active	\$ 450.00	\$ 113.34
11	Paid in Full	9,686.44	
3	Compromised	7,593.17	
52	Sold Under Contract Since 4-1-37		52,986.28
	(Original Amount \$93,710.00)		
—			
		<u>\$ 17,729.61</u>	<u>\$ 53,099.62</u>

SCHEDULE "D"—REAL ESTATE OWNED

December 31, 1939

No.	Memo	Balance 3-31-37	Balance 12-31-39
27	Now Owned	\$190,827.00	\$191,523.47
12	Cash Sales	36,357.79	
23	Sold Under Contract.....	73,442.95	
	(Title Acquired) (Net After Sales)		171,789.21
		<u>\$300,627.74</u>	<u>\$363,312.68</u>

SCHEDULE "E"—REAL ESTATE SOLD

December 31, 1939

	Sale Price	Appraised Value	Book Value	Book Loss
24	Cash Sales	\$ 42,053.50	\$ 75,000.08	\$ 32,946.58
52	Contract Sales	93,710.00	122,672.51	28,962.51
		<u>\$135,763.50</u>	<u>\$197,672.59</u>	<u>\$ 61,909.09</u>

[Endorsed]: (Report and Account of Harry W. Hill, as Receiver of Intermountain Building & Loan Association, an Utah Corporation, and Petition for Approval thereof and for Order Fixing Date of Hearing and Prescribing the Form of Notice to be Given) Filed Mar 20 1940. Edward W. Scruggs, Clerk, United States District Court for the District of Arizona. By Helen Stroup, Deputy Clerk. [191]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF
LAW ON PETITION OF ELIZABETH G.
MONAGHAN FOR ALLOWANCE OF AT-
TORNEY'S FEES, EXPENSES, ET
CETERA.

This matter came on regularly for hearing before the court on the 20th day of December, 1937, pursuant to an order to show cause which was made and entered by this court under date of November 22, 1937, Honorable Dave W. Ling, United States District Judge presiding and sitting without a jury. Petitioner, Elizabeth G. Monaghan appeared in person and by her attorney, Joseph H. Morgan, Esquire. Evidence was introduced, both oral and documentary, on behalf of said petitioner, and the matter was duly submitted to the court for decision, and taken under advisement.

Now, Therefore, having duly considered all the evidence and pleadings, and being fully advised in the premises, the court does hereby, pursuant to rule 52 of the Federal Rules of Civil Procedure, make and adopt the following as its special findings of fact, and conclusions of law, in this matter. [192]

SPECIAL FINDINGS OF FACT

I.

That the petitioner, Elizabeth G. Monaghan, was during all of the times herein mentioned, an attorney at law duly licensed to practice in all courts in the State of Arizona, and particularly in the

District Court of the United States for the District of Arizona.

II.

That early in the year 1932 she was employed by a number of creditors of Intermountain Building & Loan Association, an Utah corporation, which was duly authorized and licensed to engage in, and which was engaging in and transacting business in the state of Arizona, to investigate into the affairs of said association as to its solvency and administration.

III.

That the petitioner made an extensive investigation in the state of Arizona and in the state of Utah and discovered that the business of the defendant association was being conducted in a manner contrary to law, extravagantly and wastefully, and in a manner which would ultimately result in the waste and dissipation of all of the assets of the association, and with the assistance of one James A. Smith, a certified public accountant practicing his profession in Phoenix, Arizona, determined that the association had been insolvent from about the year 1922, if not before that date.

IV.

That said petitioner, Elizabeth G. Monaghan, was authorized in writing by Guadalupe R. Gallegos and Francisca Gallegos, his wife, Inga G. Gudmundson, and Mata E. Dexter, in their own behalf, and in behalf of other similarly situated, to institute a suit in the District Court of the United States

[193] for the District of Arizona, to have said association adjudged to be insolvent and to have a receiver appointed to liquidate the assets of said association, and to do all things necessary or essential to that end, including the power and authority to associate counsel in the conduct of said proceedings, and to file, defend and conduct suits in the state courts in aid thereof.

V.

That pursuant to said authorization the petitioner, Elizabeth G. Monaghan, on April 8, 1933, filed a bill of complaint in equity, being cause No. E-268-Phoenix, entitled as in the caption hereof, in the United States District Court for the District of Arizona; that subsequently and on or about the 23rd day of June, 1933, she filed an amended bill of complaint in the cause herein mentioned.

VI.

That subsequent to the filing of the amended bill of complaint petitioner formally associated one Thomas W. Nealon as counsel in the suit mentioned.

VII.

That the suit mentioned was opposed by the defendant Intermountain Building & Loan Association, and by one J. A. Malia, Bank Commissioner of the state of Utah, who had theretofore been permitted to intervene in the cause.

VIII.

That after a number of hearings had over the period of about a year, in which petitioner and her co-counsel, Thomas W. Nealon, were opposed by several attorneys practicing in the state of Arizona, and by two attorneys of the state of Utah, one of which was an assistant attorney general for that state, the United States District Court for the District of Arizona, on April 20, [194] 1934, the Honorable F. C. Jacobs presiding, appointed a receiver pendente Lite for said association.

IX.

That an appeal was taken by the defendant association and by J. A. Malia, Bank Commissioner of the state of Utah, intervenor, from the order appointing a receiver pendente lite to the United States Circuit Court of Appeals for the Ninth Circuit; that said appeal was docketed as No. 7516 in the last mentioned court.

X.

That the United States Circuit Court of Appeals for the Ninth Circuit, on August 5, 1935, entered its judgment sustaining the order of the United States District Court for the District of Arizona appointing a receiver pendente lite; that the decision of the United States Circuit Court of Appeals for the Ninth Circuit is reported in 78 Fed. (2d) at page 972.

XI.

That the defendant, Intermountain Building & Loan Association, an Utah corporation, and J. A.

Malia, Bank Commissioner of the state of Utah, filed a petition for a writ of certiorari in the Supreme Court of the United States; that the petitioner and her co-counsel, Thomas W. Nealon, resisted said petition and the same was denied by the Supreme Court of the United States on November 11, 1935 (296 U. S. 639), and the mandate of the United States Circuit Court of Appeals for the Ninth Circuit, in its cause No. 7516, was returned to the United States District Court for the District of Arizona, and was by that court, on December 2, 1935, spread on the records in its cause E-268-Phoenix, entitled as in the caption hereof.

XII

That after due notice and trial on the merits the [195] United States District Court for the District of Arizona, on January 6, 1937, found that the Intermountain Building & Loan Association, an Utah corporation, was insolvent and that the allegations of the amended complaint were true, and entered its findings of fact and conclusions of law thereon; that after the defendant association was adjudged to be insolvent the United States District Court for the District of Arizona appointed a permanent receiver to liquidate the assets of the defendant association.

XIII.

That the fund, represented by the assets of Intermountain Building & Loan Association, an Utah corporation, located in the state of Arizona, which was brought into court by petitioner as attorney

for plaintiffs and others similarly situated, had a total book value as of April 1, 1937, of approximately \$1,597,841.89, without taking into consideration probable loss on realization; that the assets of the defendant association in other states, to-wit, California, Oregon and Wyoming, which were not in the actual or constructive possession of the receiver appointed by the District Court of the United States for the District of Arizona, had a book value of approximately \$1,135,229.34, without taking into consideration probable loss on realization; that the receiver appointed by this court had no control whatsoever of assets located in California, Oregon and Wyoming; that the courts of the state of Utah have appointed one James L. White as liquidator in that state and the assets in that state had a book value of approximately \$414,808.16, without taking into consideration probable loss on realization; that the net assets are eventually going to be turned over to this court's receiver for distribution. [196]

XIV.

That the approximate assets now in the hands of the receiver appointed by this court have a book value of approximately \$633,131.59, with a probable further loss on realization of approximately \$156,000.00; that the total realization in the states of Arizona, California, Oregon, Utah and Wyoming will be approximately \$1,237,900.10, after loss on realization.

XV.

That approximately 2792 creditors of the defendant association filed their claims with the receiver and thereby elected to accept the services of petitioner Elizabeth G. Monaghan, and obligated themselves to pay her a reasonable fee for the services rendered to them by her in said suit to the same extent as if they had signed a written contract to that effect before the suit was brought.

XVI.

That the only creditors who failed to file claims to participate in the said fund were creditors in the state of California for claims aggregating approximately \$70,000.00, and creditors in the state of Oregon having claims aggregating approximately \$260,000.00, for the reason that the assets of the association in the states of California and Oregon were being administered by statutory liquidators under the laws of said states pursuant to proceedings filed in said respective states subsequent to the filing of the suit in equity in the United States District Court for the District of Arizona, above entitled and numbered.

XVII.

That Honorable Dave W. Ling was appointed and qualified as a Judge of the United States District Court for the District of Arizona on June 10, 1936. [197]

XVIII.

That the expenses of \$301.65 incurred by petitioner, as set forth in her petition, were included in

the expenses listed by Thomas W. Nealon, her co-counsel, and allowed him by this court.

XIX.

That the allowance of \$10,000.00 for expenses petitioner claims she and her co-counsel, Thomas W. Nealon, became obligated to pay to James A. Smith, a certified public accountant, is not a proper charge against the funds in the hands of the receiver.

XX.

That petitioner between the 1st day of December, 1935, and the 1st day of April, 1937, receive a salary of \$250.00 per month for services rendered as one of the attorneys for the former receiver of Inter-mountain Building & Loan Association, or a total sum covering salary for the period of time mentioned of \$4,000.00.

XXI.

That subsequent to the time of the hearing of petitioner's petition, to-wit, subsequent to December 20, 1937, the petitioner, Elizabeth G. Monaghan, was paid allowances on order of this court as follows: February 21, 1937—\$5,000.00; March 6, 1939—\$2,500.00, or a total of \$7,500.00 for her services rendered in connection with the preparation, institution and trial of cause No. E-268-Phoenix, entitled as shown in the caption hereof, including services rendered by her on the appeal from the interlocutory decree to the Circuit Court of Appeals for the Ninth Circuit, and for her services in opposing the petition of the defendant association and J. A. Malia for writ of certiorai to review the decision of the Circuit

Court of Appeals for the Ninth Circuit in cause No. 7516. [198]

XXII.

That a reasonable compensation to the attorneys and/or solicitors, i.e. Elizabeth G. Monaghan and Thomas W. Nealon, for their services as specified in their respective petitions on file herein is \$25,000.00; that a reasonable compensation to petitioner Elizabeth G. Monaghan for all her services rendered in connection with the matters and things set forth in her petition is \$12,500.00, or one-half of the total allowances, less the amount heretofore paid to her on account, to-wit, \$7,500.00.

CONCLUSIONS OF LAW

(1) That petitioner, Elizabeth G. Monaghan, is entitled to total allowance of \$12,500.00 or one-half of the amount allowed by legal services rendered by her and her co-counsel, Thomas W. Nealon, less the amount of \$7,500.00 already paid to her on account.

(2) That petitioner, Elizabeth G. Monaghan, is not entitled to expenses totalling \$301.65, claimed by her.

(3) That petitioner, Elizabeth G. Monaghan, is not entitled to an allowance for services claimed to be performed by James A. Smith, a certified public accountant, which she claims she and her co-counsel, Thomas W. Nealon, are obligated to pay.

(4) That the petitioner, Elizabeth G. Monaghan, is entitled to have a lien upon the assets of Inter-mountain Building & Loan Association, an Utah corporation, now in the hands of Harry W. Hill, Re-

ceiver, for the sum of \$5,000.00 until such sum is paid; and that each of the creditors of said association who have elected to accept the benefit of petitioner's efforts bear their proportionate share of such allowance.

That the foregoing Special Findings of Fact and [199] Conclusions of Law be entered nunc pro tunc as of the 7th day of December, 1942.

Dated at Phoenix, Arizona, this 5th day of March, 1943.

DAVE W. LING

Judge of the District Court of
the United States for the
District of Arizona. [200]

[Title of District Court and Cause.]

STIPULATION RE FINDINGS OF FACT AND
CONCLUSIONS OF LAW

It is stipulated by and between the petitioner, Elizabeth G. Monaghan, through her attorney, Henry S. McCluskey, Esquire, and Harry W. Hill, as Receiver of Intermountain Building & Loan Association, an Utah corporation, through his attorney Louis B. Whitney, Esquire, that the foregoing Findings of Fact and Conclusions of Law may be signed by the Judge of the United States District Court for the District of Arizona, and entered and filed nunc pro tunc as of December 7, 1942.

Dated at Phoenix, Arizona, this 5th day of March, 1943.

HENRY S. McCLUSKEY

Attorney for Petitioner.

LOUIS B. WHITNEY

Attorney for Harry W. Hill,
Receiver of Intermountain
Building & Loan Association,
an Utah corporation.

[Endorsed]: Findings of Fact etc. and Stipulation
Filed Mar. 5, 1943. Edward W. Scruggs, Clerk
United States District Court for the District of Arizona.
By Gwen. Roby, Deputy Clerk. [201]

In the District Court of the United States
for the District of Arizona

No. E-268-Phoenix

GUADALUPE R. GALLEGOS, et al.,
Plaintiffs,
vs.

INTERMOUNTAIN BUILDING & LOAN ASSOCIATION,
a corporation,
Defendant.

FINAL ORDER FIXING ATTORNEYS' FEES
AND EXPENSES, AND ORDERING PAYMENT
OF BALANCE DUE ELIZABETH G.
MONAGHAN.

Whereas, Elizabeth G. Monaghan, formerly one of
the attorneys for Henry S. McCluskey the former

receiver of Intermountain Building & Loan Association, an Utah corporation, having heretofore, and on the 22nd day of November, 1937, filed in this court and cause her verified petition praying that that court allow her such sum as it deems reasonable compensation to her for her services rendered in connection with the preparation, institution and trial of the above entitled and numbered cause, including services rendered by her on the appeal of the interlocutory decree rendered herein to the Ninth Circuit Court of Appeals, and for her services in opposing the petition of the defendant corporation and J. A. Malia to the Supreme Court of the United States for a writ of certiorari to review the proceedings in this court and the circuit court of appeals, and praying that such allowance be for all legal services rendered by the solicitors for the plaintiffs in the above entitled and numbered action; and further praying that she be allowed the additional sum of \$401.65 for expenses [202] claimed to have been necessarily incurred by her, as set forth in the petition above referred to; and further praying that she be allowed the additional sum of \$10,000.00 for claimed expenses she became obligated to pay to one James A. Smith, C.P.A.; and

Whereas, it appears that said petition of Elizabeth G. Monaghan before referred to duly and regularly came on for hearing before this court on the 20th day of December, 1937, pursuant to an order to show cause which was made and entered by this court in the above entitled and numbered proceeding under date of November 22, 1937, and after witnesses had

been examined and sworn and evidence introduced in support of said petition, the said petition was submitted and taken under advisement; and

Whereas, it appears that said petitioner subsequent to the hearing had on said petition, to-wit, subsequent to December 20, 1937, was by orders of this court theretofore duly made and entered, paid allowances on account as follows: February 21, 1938—\$5,000.00; March 6, 1939—\$2,500.00, or a total of \$7,500.00; and

Whereas, it appears that heretofore, to-wit: and between the 1st day of December, 1935, and the 1st day of April, 1937, said petitioner Elizabeth G. Monaghan received a salary of \$250.00 per month for services rendered as one of the attorneys for the former receiver of Intermountain Building & Loan Association, or a total sum covering said salary for said period of time of \$4,000.00; and

Whereas, it appears to this court that a reasonable compensation to the attorneys and/or solicitors for their services rendered as specified in the petitions on file herein is \$25,000.00; and [203]

Whereas, it appears to this court that a reasonable compensation to said petitioner for all of her services rendered in connection with the matters and things set forth in her petition would be \$12,500.00, or one-half of said total allowance, less the amounts heretofore paid petitioner on account, to-wit: \$7,500.00; and

Whereas, it appears to this court that the sum of \$4,000.00 covering her salary between December 1,

1935, and April 1, 1937, is sufficient compensation for petitioner as one of the attorneys for the former receiver, Henry S. McCluskey;

Now, Therefore, the premises considered, It Is Ordered, Adjudged and Decreed, that the total compensation of Elizabeth G. Monaghan on account of services rendered by her as an attorney in the preparation, institution and trial of the foregoing entitled and numbered cause, as set forth in her petition, is hereby fixed at \$12,500.00, same being one-half of the total compensation fixed and allowed for all services rendered by petitioner and her co-attorney;

It Is Further Ordered, Adjudged and Decreed that Harry W. Hill, Receiver of Intermountain Building & Loan Association, an Utah corporation, be and he is hereby authorized, empowered and directed to pay to the said Elizabeth G. Monaghan the sum of \$5,000.00 as and for the balance of said \$12,500 fixed by this court as final compensation for all services heretofore rendered and performed by the said Elizabeth G. Monaghan as set forth in her said petition.

It Is Further Ordered, Adjudged and Decreed that the expenses and allowances, other than compensation for petitioner, prayed for in her petition be and they hereby are denied in toto.

It Is Further Ordered, Adjudged and Decreed and the Court does hereby Order, Adjudge and Decree that this is a final allowance and covers all services heretofore rendered by said [204] Elizabeth

G. Monaghan, as set forth in her said petition and as attorney for the former receiver.

It Is Further Ordered, Adjudged and Decreed, and the court does hereby Order, Adjudge an Decree that the petitioner, Elizabeth G. Monaghan, have a lien upon the assets of Intermountain Building & Loan Association, an Utah corporation, now in the hands of Harry W. Hill, as receiver of such association, for the said sum of \$5,000.00 until such sum is paid; and that each of the creditors of said association who have elected to accept the benefit of said petitioner's efforts bear their proportionate share of such allowance.

Done in Open Court this 7 day of December, 1942.

DAVE W. LING

Judge of the United States
District Court for the District
of Arizona.

[Endorsed]: Filed Dec. 7, 1943. [205]

[Title of District Court and Cause.]

FINAL ORDER FIXING ATTORNEYS' FEES
AND EXPENSES, AND ORDERING PAY-
MENT OF BALANCE DUE THOMAS W.
NEALON

Whereas, Thomas W. Nealon, formerly one of the attorneys for Henry S. McCluskey the former receiver of Intermountain Building & Loan Association, an Utah corporation, having heretofore, and

on the 15th day of October, 1937 filed in this court and cause his verified petition praying that this court allow him such sum as it deems reasonable compensation to him for his services rendered in connection with the preparation, institution and trial of the above entitled and numbered cause, including services rendered by him on the appeal of the interlocutory decree rendered herein to the Ninth Circuit Court of Appeals, and for his services in opposing the petition of the defendant corporation and J. A. Malia to the Supreme Court of the United States for a writ of certiorari to review the proceedings in this court and the circuit court of appeals, and praying that such allowance be on the basis of one-half of such sum as this court may find to be a reasonable sum for all legal services rendered by the solicitors for the plaintiffs in the above entitled and numbered action; and further praying that he be allowed the additional sum of \$1330.40 for [206] out-of-pocket expenses necessarily incurred by him, as set forth in the petition of said Thomas W. Nealon heretofore filed in this court and above referred to; and further praying that in the event this court should deem it inadvisable at that time to pay to said Thomas W. Nealon the full amount which he would be entitled to for his services as solicitor for the plaintiffs in the above entitled proceeding that this court make an allowance to him for the amount of out-of-pocket expenses incurred by him and an allowance upon account for the services rendered by him; and

Whereas, it appears that said petition of Thomas W. Nealon before referred to duly and regularly came on for hearing before this court on the 20th day of December, 1937, pursuant to an order to show cause which was made and entered by this court in the above entitled and numbered proceeding under date of October 15, 1937, and after witnesses had been examined and sworn and evidence introduced in support of said petition, the said petition was submitted and taken under advisement; and

Whereas, it appears that said petitioner subsequent to the hearing had on said petition, to-wit, subsequent to December 20, 1937, was by orders of this court theretofore duly made and entered, paid allowances on account as follows: February 21, 1938—\$5,000.00; March 6, 1939—\$2,500.00, or a total of \$7,500.00; and

Whereas, it appears that heretofore, to-wit: and between the 1st day of December, 1935, and the 1st day of April, 1937, said petitioner Thomas W. Nealon received a salary of \$300.00 per month and an additional amount of \$159.00 per month as expenses for services rendered as one of the attorneys for the former receiver of Intermountain Building & Loan Association, or a total sum covering salary and expenses for said period of time of \$7,344.00; and [207]

Whereas, it appears to this court that a reasonable compensation to the attorneys and/or solicitors for their services rendered as specified in the petitions on file herein is \$25,000.00; and

Whereas, it appears to this court that a reasonable compensation to said petitioner for all of his services rendered in connection with the matters and things set forth in his petition would be \$12,500.00, or one-half of said total allowance, less the amounts heretofore paid petitioner on account, to-wit: \$7,500.00; and

Whereas, it appears to this court that the sum of \$7,344.00 covering salary and expenses between December 1, 1935, and April 1, 1937, is sufficient compensation for petitioner as one of the attorneys for the former receiver, Henry S. McCluskey;

Now, Therefore, the premises considered, It Is Ordered, Adjudged and Decreed, that the total compensation of Thomas W. Nealon on account of services rendered by him as an attorney in the preparation, institution and trial of the foregoing entitled and numbered cause, as set forth in his petition, is hereby fixed at \$12,500.00, same being one-half of the total compensation fixed and allowed for all services rendered by petitioner and his co-attorney;

It Is Further Ordered, Adjudged and Decreed that Harry W. Hill, Receiver of Intermountain Building & Loan Association, a Utah corporation, be and he is hereby authorized, empowered and directed to pay to the said Thomas W. Nealon the sum of \$5,000.00 as and for the balance of said \$12,500.00 fixed by this court as final compensation for all services heretofore rendered and performed

by the said Thomas W. Nealon as set forth in his said petition.

It Is Further Ordered, Adjudged and Decreed that said Harry W. Hill, receiver of Intermountain Building & Loan [208] Association, an Utah corporation, be and he is hereby authorized, empowered and directed to pay to the said Thomas W. Nealon the additional sum of \$1330.40, being expenses incurred by said petitioner, as set forth in his said petition.

It Is Further Ordered, Adjudged and Decreed and the Court does hereby Order, Adjudge and Decree that this is a final allowance and covers all services heretofore rendered by said Thomas W. Nealon, as set forth in his said petition and as attorney for the former receiver.

It Is Further Ordered, Adjudged and Decreed, and the court does hereby Order, Adjudge and Decree that the petitioner, Thomas W. Nealon, have a lien upon the assets of Intermountain Building & Loan Association, an Utah corporation, now in the hands of Harry W. Hill, as receiver of such association, for the said sums of \$5,000.00 and \$1,330.40 respectively, until such sums are paid; and that each of the creditors of said association who have elected to accept the benefit of said petitioner's efforts bear their proportionate share of such allowance.

Done In Open Court this 7 day of December,
1942.

DAVE W. LING,

Judge of the District Court of
the United States for the
District of Arizona.

[Endorsed]: Filed Dec. 7, 1942. [209]

[Title of District Court and Cause.]

REPORT AND ACCOUNT OF HARRY W.
HILL, AS RECEIVER OF INTERMOUN-
TAIN BUILDING & LOAN ASSOCIATION,
AN UTAH CORPORATION, AND PETI-
TION FOR APPROVAL THEREOF AND
FOR ORDER FIXING DATE OF HEAR-
ING AND PRESCRIBING THE FORM OF
NOTICE TO BE GIVEN

Comes Now Harry W. Hill, as Receiver of In-
termountain Building & Loan Association, an Utah
corporation, and makes and files this report of the
administration and receivership of Intermountain
Building & Loan Association, an Utah corporation,
for the period commencing January 1, 1940, to and
including December 31, 1942, and in this behalf
represents and shows:

I.

That Harry W. Hill, Receiver of said association,
heretofore and on the 20th day of March, 1940, filed

in this court and cause a report of his administration of the affairs of said association, which report embraced the period of receivership and his administration from April 1, 1937, to and including December 31, 1939. This report covers the period from January 1, 1940, to and including December 31, 1942. [210]

II.

That the following, designated as "Schedule A—Trial Balance" shows the balances of the various accounts as of the close of business December 31, 1942, which trial balance, with the exceptions of Idaho and Arizona, is not current. The Idaho receivership assets have been distributed to this Receiver and are included in the following "Schedule A—Trial Balance"

SCHEDULE "A"—TRIAL BALANCE AS OF DECEMBER 31, 1942

DEBITS

Cash on Hand and in Banks—	
Arizona	\$ 357,789.06
Other States	59,391.08
Real Estate Loans—Arizona	50.23
Other States	505,102.75
Real Estate Contracts—Arizona.....	23,814.90
Other States	61,619.90
Real Estate Owned—Arizona	228,086.72
Other States	578,920.48
Promissory Notes & Second Mortgages—Arizona	2,501.43
Certificate Loans—Arizona	130,388.06
Other States	194,306.32
Stocks, Bonds & Securities—Other States	161,575.00
Home Building & Loan Company Stock	51,000.00

Debits—(Continued)

Deficiency Judgments	48,792.39
Claims and Judgments	272.74

Figures in italics typed in red.

Accounts Receivable—Arizona	9,510.39
Other States	10,860.92
Furniture and Fixtures—Arizona..	11,378.86
Other States	4,061.95
Tax Suspense—Oregon	2,769.97
Real Estate Operating Expenses—	
Arizona	151,275.20
Real Estate Operating Expense	
from 1-1-40 to 12-31-42:	

Sewer & Water	\$ 1,920.94
Repairs	4,386.16
Taxes & Assessments.....	19,019.58
Insurance & Title Expense.....	4,941.47
Rental & Misc. Expense.....	3,724.59
Golf Course Expense85
Liability Insurance & Agents	
Bonds	752.19

\$ 34,745.78

Real Estate Sales — Close Outs—	
Arizona	8,503.23
Other States	1.10
Real Estate Operating Expense—	
Idaho	2,288.38
Real Estate Operating Expense—	
California	411.74

Figures in italics typed in red.

Receiver's Liquidating Expense—	
Arizona	233,740.45
	[211]

Receiver's Liquidating Expense
from 1-1-40 to 12-31-42:

Receiver's Salary	\$ 15,100.00
Legal Advisors	30,455.40
Employees Salaries	19,884.45
Printing Supplies & Stat.....	411.71
Rent	2,754.00

Debits—(Continued)

Telephone, Telegraph, Postage	850.97	
Travel Expense	1,183.60	
Office Equip. & Maintenance....	64.47	
Court Costs & Fees.....	51.32	
Bonds	601.07	
Insurance	333.65	
Miscellaneous Items	239.93	
Appraisal Fees	497.00	
Social Sec. & Unemp. Tax.....	689.83	
	<hr/>	
	\$ 73,117.40	
Expense—California		\$ 3,316.62
Expense—Idaho		6,572.35
Expense—Utah		138.97
Expense—Oregon		2,222.88
Loss on Realization—Arizona		165,614.36
Loss on Realization—Other States..		62,391.60
Real Estate Abandoned—Idaho.....		14,888.40
Receiver's Set-Offs in Liquidation..		17,429.81
Attorneys Fees (Services Prior to Receivership)		8,201.21
Master's Expense (Claims hearing & report)		1,408.47
		<hr/>
		<u>\$3,119,226.76</u>

CREDITS

Defeciancy Judgments—Uncollected		\$ 50,747.70
Receiver's Income		217,121.04
Receiver's Income from 1-1-40 to 12-31-42:		
Rents	\$ 46,239.50	
Golf Course	96.00	
Real Estate Loans—Interest....	609.26	
Real Estate Contracts — In- terest	7,133.78	
Notes & 2nd Mort.—Interest..	163.62	
Accts. Rec. & Judg.—Interest	116.42	
	<hr/>	
	\$ 54,358.58	

Credits—(Continued)

Dividend Account—Wyoming	
(Transfer)	60.07
Interest—Other States	2,958.59
Real Estate Operating—Other	
States	2,149.22
Receiver's Income—Gain on Realization	20,211.62
General Suspense	12.95
<hr/>	
Figures in italics typed in red.	
Trust Accounts — Payments after Receivership	55.00
Accrued Int. Uncollected (12-31-33)	
Other States	39,772.71
Reserve for Maturities	150,029.91
Permanent Reserve Fund Stock	87,671.42
	[212]
General Surplus	75,813.12
Stock Suspense — Certificates	31,565.22
Investment Certificates	2,045,036.44
Coupon Stock	79,342.01
Fully Paid Certificates	268,894.35
Extra Payments on Certificates.....	13,311.65
Pass Books Saving Certificates.....	34,499.64
	<hr/>
	\$3,119,226.76
	<hr/>

III.

On December 31, 1939 the Real Estate Loans in Arizona showed a balance of \$5,984.88. The status of these loans as of December 31, 1942, is set forth in the following Schedule "B"—"Real Estate Loans", showing a balance of \$50.23. This amount represents balance on Loan No. 357 on Lot 1, Block 1, Wilson Addition to Winslow, and is not collectible as the property was abandoned by mortgagee on account of accumulated back taxes:

SCHEDULE "B"—REAL ESTATE LOANS

	Balance Due 12-31-39	Collected	Balance Due 12-31-42
6 Active Loans	\$5,934.65	\$	
1 Inactive Loan	50.23		\$ 50.23
6 Loans Paid in Full.....		5,934.65	
	<hr/> \$5,984.88 <hr/>	<hr/> \$5,934.65 <hr/>	<hr/> \$ 50.23 <hr/>

IV.

On December 31, 1939, Real Estate Contracts showed a balance of \$53,099.62, covering forty-seven individual contracts. Forty-five have been paid in full to December 31, 1942. Since December, 31, 1939 twenty-six pieces of real estate have been sold for an original amount of \$42,025.00. All contracts, excepting Contract #160 Idaho with an unpaid amount of \$592.25, are up to date with payments being made regularly in accordance with the terms of the contracts. The status of the contracts as of December 31, 1942 is set forth in the following Schedule "C"— [213]

SCHEDULE "C"—REAL ESTATE CONTRACTS

47 Contracts—Principal unpaid balance 12-31-39....	\$ 53,099.62
26 Sold under contract from 12-31-39 to 12-31-42....	42,025.00
	<hr/> \$ 95,124.62
48 Paid in full (prin. collected 12-31-39 to 12-31-42)	71,309.72
25 With balance unpaid as of 12-31-42.....	<hr/> \$ 23,814.90 <hr/>

V.

On December 31, 1939, Real Estate Owned showed a balance of \$363,312.68 covering forty-nine pieces

of property. From December 31, 1939 to December 31, 1942 five pieces of property were sold for cash in the amount of \$44,300.00 and twenty-six pieces were sold under contract for \$42,025.00. The Real Estate Owned, Schedule "D", for the period covered by this report is given below:

SCHEDULE "D"—REAL ESTATE OWNED

	Book Value
49 pieces owned as of 12-31-39.....	\$363,312.68
26 pieces sold under contract for \$42,025.00	
5 pieces sold for cash..... 44,300.00	
—	
31	
Loss on Book Value..... 48,900.96	
	<hr/>
31	135,225.96
—	<hr/>
18 on hand 12-31-42.....	\$228,086.72
	<hr/> <hr/>

VI.

A tabulation of the totals of the sale prices, appraised values, book values and losses from book values is given below in Schedule "E":

SCHEDULE "E"

	Sale Price	Appraised Value	Book Balance	Book Loss
26 Contract				
Sales	\$42,025.00	\$ 44,621.00	\$ 72,517.17	\$ 30,178.62
5 Cash Sales	44,300.00	58,670.40	62,708.79	18,722.34
	<hr/>	<hr/>	<hr/>	<hr/>
	\$ 86,325.00	\$103,291.40	\$135,225.96	\$ 48,900.96
	<hr/> <hr/>	<hr/> <hr/>	<hr/> <hr/>	<hr/> <hr/>

[214]

VII.

Promissory Notes and Second Mortgages having a balance of \$3,346.72 as of December 31, 1939, have been reduced to a balance of \$2,501.43 as of December 31, 1942, as shown in Schedule "F" below. The major portion of the present balance is not collectable owing to foreclosure by the H.O.L.C. of the properties covered by the notes and second mortgages and the re-sale by them at prices which left no equity in the paper held by this Association.

SCHEDULE "F"

	Amount Due 12-31-39	Collected	Amount Due 12-31-42
12 Uncollected or			
Collected in part	\$2,844.98	\$ 343.55	\$2,501.43
4 Collected in full.....	486.78	486.78	
1 Adjusted	14.96	14.96	
	<hr/>	<hr/>	<hr/>
	\$3,346.72	\$ 845.29	\$2,501.43
	<hr/>	<hr/>	<hr/>

VIII.

Some payments have been made on the Deficiency Judgments, but the major portion are not collectable. Balances and collections for the period covered by this report are tabulated in Schedule "G" below:

SCHEDULE "G"—DEFICIENCY JUDGMENTS

Balance of of December 31, 1939.....	\$ 50,496.71
Amount Collected	1,704.32
	<hr/>
Balance as of December 31, 1942.....	\$ 48,792.39
	<hr/>

IX.

Accounts Receivable at December 31, 1939, amounted to \$9,523.00 for Arizona. Of this amount \$1,831.80 was an account charged to M. E. Waddoups. An attempt to enforce collection was [215] made through Cause No. 44001. The Court ordered that the "plaintiff take nothing". The remainder of the account, \$7,691.20 as of December 31, 1939, was the principal amount due from J. A. Swanson on the sale of the Canadian assets. Since that time \$97.67 has been collected as interest and \$12.61 collected as principal, leaving a balance due on June 30, 1942, of \$7,678.59.

X.

Furniture and Fixtures as of December 31, 1939, were carried at \$11,421.86. Nine old chairs and three small tables were sold for \$23.00, and one typewriter requisitioned by the U. S. Government for a price of \$20.00, leaving the balance of the account as of December 31, 1942, \$11,378.86.

XI.

California: The Building & Loan Commissioner of the state of California in his "Intermediate Financial Statement as of December 31, 1941, and Petition for Approval and Instructions" to the Superior Court of the state of California, included the following Balance Sheet as of December 31st, 1941:

	Guaranty Fund	Regular Fund	Total
Assets:			
Cash in Banks.....	\$ 32,420.82	\$ 20,632.96	\$ 53,053.78
S. F. Harbor Bonds....	90,000.00	—	90,000.00
Loans	—	2,355.91	2,355.91
Real Estate	—	2,799.70	2,799.70
Certificate Loans	15,282.01	325,184.92	340,466.93
Advance to Liquidating Office	—	105.34	105.34
	<u>\$137,702.83</u>	<u>\$351,078.83</u>	<u>\$488,781.66</u>

[216]

Liabilities:			
Advance from borrow- ers	\$ —	\$ 14.77	\$ 14.77
Approved Claims	151,393.68	3,987,383.30	3,138,776.98
Interest on Accrued Claims	73,893.41	1,445,237.91	1,519,131.32
Deficit	87,584.26	4,081,557.15	4,169,141.41
	<u>\$137,702.83</u>	<u>\$351,078.83</u>	<u>\$488,781.66</u>

XII.

Idaho: From January 1, 1940, to December 31, 1942, operating costs and collections for the state of Idaho were as follows:

ASSETS—STATE OF IDAHO—DEC. 31, 1942

Contracts	\$ 857.88	
Real Estate Owned	2,148.70	
Certificate Loans	43,449.19	
	<u>\$ 46,455.77</u>	
Expenses, Insurance, Titles & Mis- cellaneous		\$ 366.87
Rents Collected		420.13
Operating Gain		<u>\$ 53.26</u>

XIII.

Utah: James L. White, Receiver in Utah, has reported to me that the following is a statement of the assets and liabilities in the state of Utah as of December 31, 1941:

Assets:

Cash in Banks	\$201,390.55
Real Estate Loans.....	36,622.82
Real Estate Contracts	42,844.04
Real Estate Owned	8,060.48
Other Assets	234.92
	<hr/>
Total Assets	\$289,152.81

Liabilities:

Intermountain Bldg. & Loan Ass., Harry W. Hill, Receiver	412,709.39
First National Bank (amount in said bank & Not Included in Item Immediately Above	2,098.77
	<hr/>
	\$414,808.16
	[217]

Deduct Liquidation Losses as follows:

For year 1936	\$ 64,593.03	
For year 1937	32,889.21	
For year 1938	15,072.20	
For year 1939	6,864.20	
For year 1940	2,233.79	
For year 1941	4,002.92	125,655.35
	<hr/>	<hr/>
Total Liabilities.....		\$289,152.81
		<hr/>

XIV.

Oregon: Report of the Building & Loan Commissioner for the state of Oregon shows the following assets and liabilities of the association, as of September 30, 1942, for the state of Oregon:

Assets :

Cash	\$ 74,584.92
State Treasurer Bonds.....	107,637.44
Home Owners Loan Corporation Bonds	56,175.00
Accounts Receivable	6,515.89
Notes and Claims Receivable.....	299.72
Real Estate Mortgage Loans.....	3,679.94
Real Estate Contracts.....	56,278.23
Real Estate Owned	40,329.13
Certificate Loans	17,837.97
Deferred Debits	371.20
Furniture and Equipment.....	258.36
 Total Assets	 \$363,967.80

Liabilities:

Deferred Credits	\$ 200.00
Taxes Payable	2,845.31
Accounts Payable	435.55
Stock Payments Held in Trust	2.45
Members' Investments	215,433.48
Intermountain Head Office.....	\$341,348.51
Less Deficit	220,558.60
 Liquidation Surplus	 24,261.10
 Total Liabilities	 \$363,967.80

XV.

Wyoming: John T. Boyd, Receiver in Wyoming, in compliance with an order of the District Court of the United States [218] for the District of Wyoming, made a distribution of the assets in the state of Wyoming to the resident certificate holders of that state who had filed claims with him. The dividend was for 16½% on adjusted values, which did not include the addition of interest to the date of receivership as figured by this office and approved by this Court. The total amount paid was

\$63,901.03, and a balance left, after expenses of \$60.07, was transferred to the Arizona Receiver.

A synopsis of the Wyoming dividend payments as they apply to my records of Wyoming Certificate Holders follows:

Unfiled in

Arizona	\$68,520.83	(Wyoming paid \$ 2,660.05 on \$ 17,721.62
		(Wyoming paid .— on 50,779.21

Filed in

Arizona	\$510,717.41	(Wyoming paid \$61,240.98 on \$406,083.50
		(Wyoming paid .— on 104,633.91

\$579,238.24

\$ 63,901.03

\$579,238.24

XVI.

On the 23rd day of July, 1940, I filed with this Court my report of claims of Creditors, Investors, Shareholders and others, aggregating approximately 3,012 claimants, and with said report filed a petition praying for order for the allowance or disallowance of each of the several claims filed. It was ordered that my petition be referred to Neil C. Clark, Special Master in Chancery. The Special Master reviewed all matters for the determination of which my petition prayed, and on filing his report with this Court was sustained in his findings in all matters excepting as to off-sets of loans against certificates pledged as security. I was ordered to disregard the Master's suggestion in this respect and make distribution in accordance with the Utah [219] statute which disallows off-sets of the character under discussion.

In accordance with the recommendations of the Special Master and the approval of this Court,

interest has been figured and added to the date of receivership on certificates which had matured prior to March 22, 1934, the date of receivership.

Total liabilities to certificate holders as of the final date covered by my previous report are listed below in Classes of Stock, and since this Court's approval of the Master's report eliminates preference of one class of stock over any other class, the present liability to the certificate holders, with interest added to date of receivership, immediately follows, with all classes of stock listed as to states in which application therefor was made:

**TOTAL LIABILITIES TO CERTIFICATE HOLDERS
AS OF DECEMBER 31, 1939.**

Stock Suspense Certificates	\$ 31,565.22
Investment Certificates	2,045,036.44
Coupon Stock	79,342.01
Fully Paid Certificates	268,894.35
Extra Payments on Certificates.....	13,311.65
Pass Book Savings Certificates.....	34,499.64
	<hr/>
	\$2,472,649.31
	<hr/>

**TOTAL LIABILITIES TO CERTIFICATE HOLDERS
AS OF DECEMBER 31, 1942**

States	Preferred Claims Trust Payments	Certificates Adjusted Value
Arizona	\$ 27.50	\$1,038,944.09
California	—	70,119.78
Idaho	—	427,041.44
Oregon	—	260,629.29
Utah	—	711,675.98
Wyoming	27.50	579,238.24
Miscl. States	—	54,840.31
	<hr/>	<hr/>
	\$ 55.00	\$3,142,489.13
	<hr/>	<hr/>

Certificate Loans against foregoing certificates are as follows:

States	Principal	Interest to 3-22-34	Total
Arizona	\$116,741.66	\$ 21,193.91	\$137,935.57
California	660.00	95.69	755.69
Idaho	37,041.28	6,407.91	43,449.19
Oregon	14,711.96	2,607.65	17,319.61
Utah	65,424.03	12,622.35	78,046.38
Wyoming	49,863.66	11,842.83	61,706.49
Misc. States	2,540.75	839.36	3,380.11
	<hr/>	<hr/>	<hr/>
	\$286,983.34	\$ 55,609.70	\$342,593.04
	<hr/>	<hr/>	<hr/>

Total expense of the Special Master was \$1,408.47. \$1,375.00 of this was a fee to the Master for his services, and \$33.47 was spent for stamps, printing and stationery.

XVII.

The litigation in Oregon over assets in that state which had been taken over by the Corporation Commissioner mentioned in paragraph XVI of my report filed in this court on March 20, 1940, was determined by the Circuit Court of Appeals for the Ninth Circuit in favor of the Corporation Commissioner and in favor of the Oregon certificate holders. After the adverse decision of the Circuit Court of Appeals for the Ninth Circuit your Receiver petitioned the Supreme Court of the United States for a writ of certiorari, which petition was denied.

XVIII.

The litigation in California over assets in that state which had been taken over by the Building and Loan Commissioner mentioned in paragraph

XVII of my report filed in this court on March 20, 1940, was determined by the Circuit Court of Appeals for the Ninth Circuit in favor of the Building and Loan Commissioner and in favor of the California certificate holders. After [221] the adverse decision of the Circuit Court of Appeals for the Ninth Circuit your Receiver petitioned the Supreme Court of the United States for a writ of certiorari, which petition was denied.

XIX.

On April 18th, 1941, your Receiver, with C. M. Berge, Auditor for Arizona Receiver; Lawrence L. Howe, Attorney for Arizona Receiver, met with James L. White, Receiver in Utah; Willard H. Wirtz, Executive Secretary and Chief Counsel for Oregon Commissioner; W. J. P. Farrell, Oregon Savings & Loan Supervisor; Rollin L. McNitt, Special Deputy, Building & Loan Commissioner for California; Alan G. Campbell, Attorney for California Building & Loan Commissioner, and R. L. McNitt, Jr., Manager Claims Department of California Commissioner. This meeting was held in Los Angeles for the purpose of coordinating efforts towards liquidation by working out problems and conflicts, and determine a basis of procedure which would avoid duplication of dividend payments on filings of claimants in the several offices.

Following this meeting the Commissioners of the states of California and Oregon proceeded with a determination of who could qualify as resident

certificate holders of their respective states in accordance with their Court's rulings.

In April, 1942, I received from the California Building & Loan Commissioner his full and complete schedule as approved by the Superior Court of the State of California. A condensed outline of this schedule shows the following acceptances in whole and in part as applicable for payment from the California Guaranty Fund. [222]

Accounts Originating in	Total Adjusted Value	Adjusted Value Accepted in Full or Part	Accepted as to California Guar. Fund	Rejected as to California Guar. Fund
Arizona	\$1,038,971.59	\$ 70,193.29	\$ 44,532.95	\$ 25,660.34
California	70,119.78	55,042.92	54,759.20	283.72
Idaho	427,041.44	13,987.12	10,345.36	3,641.76
Oregon	260,629.29	6,523.25	3,615.29	2,907.96
Utah	711,675.98	38,536.92	24,649.46	13,887.46
Wyoming	579,265.74	14,435.09	11,409.24	3,025.85
Misc. States	54,840.31	3,098.24	2,584.47	513.77
	<u>\$3,142,544.13</u>	<u>\$201,816.83</u>	<u>\$151,895.97</u>	<u>\$ 49,920.86</u>

The Oregon Schedule was received from Lloyd R. Smith, Corporation Commissioner, on October 12th, 1942, and shows the following acceptances and rejections as to the Guaranty Fund in that state:

Accounts Originating in	Total Adjusted Value	Adjusted Value Accepted in Full or Part	Accepted as to Oregon Guar. Fund	Rejected as to Oregon Guar. Fund
Arizona	\$1,038,971.59	\$ 2,943.54	\$ 1,286.40	\$ 1,657.14
California	70,119.78	—	—	—
Idaho	427,041.44	15,049.72	7,496.59	7,553.13
Oregon	260,629.29	223,282.52	204,867.79	18,414.73
Utah	711,675.98	4,648.98	3,780.69	868.29
Wyoming	579,265.74	1,588.18	673.14	915.04
Misc. States	54,840.31	635.76	111.87	523.89
	<u>\$3,142,544.13</u>	<u>\$248,148.70</u>	<u>\$218,216.48</u>	<u>\$ 29,932.22</u>

It is the understanding of your Receiver that the California Commissioner (now Mr. Harley Hise) paid a 50% dividend to the resident certificate holders of California from the Guaranty Fund on or about July 17th, 1942, and that he proposes to pay a second 50% in January, 1943, or as soon thereafter as may be; that after the payment of this second 50% there will remain a residue in the General Assets in the state of California, in a probable amount of between \$20,000.00 and \$30,000.00, which it is proposed to remit to your Receiver for distribution.

From correspondence with Mr. Lloyd R. Smith, Corporation [223] Commissioner of the state of Oregon, it does not appear that there is a definite and distinct line of demarcation between "Guaranty Fund" and the "General Assets" in that state. It does appear, however, that the Commissioner is determined to distribute the proceeds of all assets in the state of Oregon; that after the distribution is made from the said "Guaranty Fund", it is the intention of the Commissioner to see that the Oregon resident certificate holders share in the General Assets to the same extent as the Arizona creditors, or until 100% of the adjusted value of their account is repaid.

XX.

Your Receiver further represents that on April 6, 1942, the Building and Loan Commissioner for the state of California filed a petition for approval of schedule of claims, for approval of his accounts, and for instructions, and in said petition, among other things, asked the Superior Court of Los An-

geles County, California, for authority to pay interest at the rate of 7% per annum on all claims payable from the Guaranty Fund of that state until such claims shall have been paid in full, together with interest at the rate of 7% per annum to the date of final payment; to this petition your Receiver appeared and filed objections to the payment of any interest after March 22, 1934, on the theory that it would be unfair and inequitable to other investors and creditors of the association who are non-residents of California and who are not in anywise protected by the Guaranty Fund of that state. This matter was argued by counsel for your Receiver and on the 9th day of May, 1942, the Superior Court of Los Angeles County, California, entered an order sustaining your Receiver's objections to the payment of any interest accruing after March 22, 1934. [224]

XXI.

That on or about the 1st day of May, 1942, the Corporation Commissioner of the State of Oregon filed his Petition No. 340 for instructions and directions, which was set for hearing on the 3rd day of June, 1942, to which petition your Receiver filed an appearance and objections, and at said hearing held on the 3rd day of June, 1942, your Receiver appeared by counsel in support of his objections, and the judge, after taking said matter under advisement, overruled all of your Receiver's objections except the objection as to the payment of interest after the date of receivership and ordered distribution to be made by the Corporation Commissioner of the state

of Oregon in accordance with the so-called "chancery rule". Upon the advice of counsel your Receiver did not appeal from that order.

XXII.

That the following cases mentioned in paragraph XIX of your Receiver's report filed herein on March 20, 1940, are in the same condition as they were at the time such report was filed.

H. S. McCluskey v. Henry Parks, an action in the West Phoenix Precinct to collect delinquent rental in the sum of \$131.00; and H. S. McCluskey v. W. L. Burnham, in the Justice Court at Mesa, to recover \$23.50 delinquent rent.

XXIII.

That the action entitled "Harry W. Hill, Receiver, v. United States Fidelity & Guaranty Company, a corporation", No. Civil. 10—Phoenix, mentioned in paragraph XXII of your Receiver's report filed herein on March 20, 1940, was settled by your Receiver for \$12,500.00, which sum your Receiver has received from United States Fidelity & Guaranty Company. [225]

XXIV.

That A. H. Favour and A. S. Baker filed a claim with your Receiver against the assets of the Association for \$1,000.00, interest and costs, which was disallowed by the Special Master in his report dated December 7, 1940 and filed herein *or* or about the 17th day of December, 1940; that thereafter by an order of this Honorable Court in this matter excep-

tions to the Master's Report filed by said Favour and said Baker were on the 30th day of January, 1941, overruled; thereafter an appeal was taken to the Circuit Court of Appeals for the Ninth Circuit by said Favour and said Baker, and the case was reversed "with directions to allow appellants' (Favour and Baker) claim;" that Favour and Baker have applied to this court for an order that such claim be given preference and priority over general creditors, and such application has been denied by this Court, but the question of an appeal from said order or an application to the Circuit Court of Appeals for a more explicit direction in its mandate is still pending.

Wherefore, your petitioner prays that in accordance with said petition this report and account of the receivership and his conduct in the premises be approved and allowed; that this Honorable Court fix a date for a hearing on said report and that due notice of the filing of this report be given in the form and manner fixed by the Court; that upon hearing thereof such report be approved and for such order as the Court may deem meet and proper in the premises.

HARRY W. HILL

Receiver of Intermountain Building & Loan Association, an Utah corporation.

LOUIS B. WHITNEY

Attorney for Receiver. [226]

State of Arizona

County of Maricopa—ss.

Harry W. Hill, of lawful age, being first duly sworn, upon his oath deposes and says: That he is Receiver of the Intermountain Building & Loan Association, an Utah corporation, and petitioner above; that he has read the above and foregoing report and account, and petition, and knows the contents thereof, and that the same is true to the best of his knowledge and belief, except as to those matters alleged upon information and belief, and as to such matters he believes it to be true.

HARRY W. HILL

Subscribed and sworn to before me this 20th day of February, 1943.

(Seal)

G. H. DUDLEY

Notary Public

My Commission Expires: May 9, 1945.

[Endorsed]: Filed Feb 23 1943 [227]

[Title of District Court and Cause.]

NOTICE OF APPEAL OF
ELIZABETH G. MONAGHAN

Notice is hereby given that Elizabeth G. Monaghan, attorney for the petitioning creditors above named, hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit, from the Final Order fixing attorneys' fees and expenses and ordering payment of balance due, entered in the

above entitled matter on December 7, 1942, and from the whole thereof.

Dated at Phoenix, Arizona, this 4th day of March, 1943.

H. S. McCLUSKEY

Attorney for Elizabeth G.
Monaghan

Address: 405 Ellis Building,
Phoenix, Arizona.

[Endorsed]: Filed Mar 5, 1943 [228]

[Title of District Court and Cause.]

BOND ON APPEAL

Know All Men By These Presents:

That we, Elizabeth G. Monaghan, petitioner in the Petition for allowance of attorneys' fees for legal services rendered and expenses incurred and expenses for which the attorneys became obligated, in the preparation and trial of the above entitled suit, who is appealing, as principal, and Fidelity and Deposit Company of Maryland, a corporation duly authorized to do business as a surety company within the County of Maricopa, State of Arizona, as surety, are held and firmly bound unto Harry W. Hill, as Receiver of Intermountain Building & Loan Association, an Utah corporation, and Harry W. Hill, as Trustee of and for Guadalupe R. Gallegos, Francesca Gallegos, his wife, Inga G. Gudmundsen, and Mata E. Dexter, in their own behalf and in behalf of others

similarly situated, respondent in said matter, in the sum of Two Hundred Fifty and No/100 Dollars (\$250.00), lawful money of the United States of America, for the payment of which, well and truly to be made, we bind ourselves, our successors and legal representatives, jointly and severally by these presents. [229]

In Witness Whereof, said principal and surety have respectively caused these presents to be signed and executed by her and its duly authorized agent and attorney this 2nd day of March, 1943.

The condition of the above bond is such that:

Whereas: in The District Court of the United States, for the District of Arizona, on the 7th day of December, 1942, said court entered its Final Order fixing attorneys' fees and expenses, and ordering payment of balance due; and

Whereas, the said Elizabeth G. Monaghan, as petitioner in said matter, is desirous of appealing to the United States Circuit of Appeals for the Ninth Circuit, from said Final Order and the whole thereof; and

Whereas, under the provisions of Rule 73(c), Rules of Civil Procedure for the District Court of the United States, a bond on appeal is required to be filed in the sum of Two Hundred Fifty and No/100 Dollars (\$250.00);

Now, Therefore, if the said Elizabeth G. Monaghan, as such petitioner, will prosecute her appeal with effect, and in case the judgment of the United

States Circuit Court of Appeals for the Ninth Circuit shall be against her, that she will pay all costs that may accrue in said court by reason of her appeal, (no costs having accrued against the petitioner in the said District Court of the United States for the District of Arizona), then this obligation shall be null and void and of no effect.

Dated this 2nd day of March, 1943.

ELIZABETH G. MONAGHAN

Principal

FIDELITY AND DEPOSIT

COMPANY OF MARYLAND

By C. A. DRUMMOND (Seal)

Attorney in Fact, Surety

Approved this 5th day of March, 1943.

DAVE W. LING, Judge

[Endorsed]: Filed Mar 5 1943 [230]

[Title of District Court and Cause.]

ORDER THAT ORIGINAL PORTIONS OF
EXHIBIT No. 6, BE SENT TO THE UNITED
STATES CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT IN LIEU OF
COPIES THEREOF, IN THE APPEAL OF
ELIZABETH G. MONAGHAN.

It appearing to the court, and the court being of the opinion, that the original parts of petitioner Nealon's Exhibit No. 6, being miscellaneous bills, receipts and checks, filed December 20, 1937, as set

out as item (3) in the Designation of Additional Portions of the Record Proceedings and Evidence to be transmitted to the United States Circuit Court of Appeals for the Ninth Circuit to be contained in the record on appeal, filed by Harry W. Hill, as Receiver of Intermountain Building & Loan Association on March 16, 1943, should be inspected by the United States Circuit Court of Appeals for the Ninth Circuit and sent to said court in lieu of copies thereof, in connection with the appeal of Elizabeth G. Monaghan herein from the Final Order fixing attorney's fees and expenses, and ordering payment of balance due, entered on December 7, 1942, and from the whole thereof;

It Is Hereby Ordered that in accordance with Rule 75 (i), Rules of Civil Procedure for the District Courts of the United States, the clerk of this court shall send to the United States Circuit Court of Appeals for the Ninth Circuit, the original [234] parts of petitioner Nealon's Exhibit No. 6, being miscellaneous bills, receipts and checks, filed December 20, 1937, as set out as item (3) in the Designation of Additional Portions of the Record Proceedings and Evidence to be transmitted to the United States Circuit Court of Appeals for the Ninth Circuit to be contained in the record on appeal, filed by Harry W. Hill, as Receiver of Intermountain Building & Loan Association on March 18, 1943, in lieu of copies thereof, in connection with the appeal of Elizabeth G. Monaghan to said United States Circuit Court of Appeals for the Ninth Circuit; and that the clerk of this court shall be responsible for the safekeeping,

transportation and return of said original parts of said Exhibit No. 6.

Done in open court this 22 day of March, 1943.

DAVE W. LING

Judge

[Endorsed]: Filed Mar 22 1943. [235]

In the United States District Court
for the District of Arizona

April 1943 Term

At Phoenix

MINUTE ENTRY OF
MONDAY, APRIL 12, 1943

(Phoenix Division)

Honorable Dave W. Ling, United States District
Judge, presiding.

E-268

[Title of Cause.]

On motion of H. S. McCluskey, Esquire, counsel
for appellant, Elizabeth G. Monaghan,

It is Ordered that said appellant's time in which
to file the record on appeal herein and to docket the
action in the Circuit Court of Appeals for the Ninth
Circuit be extended ten days from April 14, 1943.

[236]

In the District Court of the United States
for the District of Arizona

No. E-268—Phoenix

GUADALUPE R. GALLEGOS, et al.,
Plaintiffs,
vs.

INTERMOUNTAIN BUILDING & LOAN AS-
SOCIATION, a corporation,
Defendant.

AMENDED DESIGNATION OF PARTS OF
RECORD TO BE TRANSMITTED TO THE
UNITED STATES CIRCUIT COURT OF
APPEALS FOR THE NINTH CIRCUIT,
ON THE APPEAL OF ELIZABETH G.
MONAGHAN.

To the Clerk of the United States District Court for
the District of Arizona :

You are hereby notified that Elizabeth G. Monaghan, who is appealing, deems the following papers and portions of the record necessary to present the questions involved on the appeal herein to the United States Circuit Court of Appeals for the Ninth Circuit, from the final order fixing attorneys' fees and expenses, and ordering payment of balance due to Elizabeth G. Monaghan, entered in said matter on December 7, 1942, and from the whole thereof; and

You are hereby requested to include in the record to be transmitted to said United States Circuit Court

of Appeals for the Ninth Circuit on said appeal, the following papers and portions of the record, to-wit:

1. Amended bill of complaint, filed June 23, 1933;

2. Affidavit of James A. Smith, filed April 18, 1933;

3. Decision of the United States Circuit Court of Appeals, dated August 5, 1935; (Case No. 7516 in said court, and reported in 78 Fed. (2) 972); [237]

4. Order of the United States Supreme Court denying certiorari; (206 U.S. 639)

5. Mandate of the United States Circuit Court of Appeals for the Ninth Circuit in Case No. 7516, entered in the above captioned matter on December 2, 1935;

6. Petitioner Monaghan's Exhibit "B" in evidence, including statement of James A. Smith attached thereto;

7. Paragraph XL, page 41, of Petitioner Nealon's Exhibit No. 3 in evidence;

8. Exhibit No. 4 in evidence, deposition of William H. Burges;

9. Final Order fixing attorneys' fees and expenses, and ordering payment of balance due, (as to Elizabeth G. Monaghan) entered December 7, 1942;

10. Final Order fixing attorneys' fees and expenses, and ordering payment of balance due, (as to Thomas W. Nealon) entered December 7, 1942;

11. Findings of Fact and Conclusions of Law, made nunc pro tunc as of December 7, 1942;

12. Stipulation dated March 5, 1943, as to filing

of Findings of Fact and Conclusions of Law, nunc pro tunc;

13. Original Reporter's transcript of evidence on hearing of petitions of Elizabeth G. Monaghan and Thomas W. Nealon;

14. Notice of Appeal;

15. Bond on Appeal;

16. This Amended Designation;

17. Statement of Points to be relied on;

18. Schedules "A", Trial balance as of December 31, 1939; "B", Real Estate Loans, December 31, 1939; "C", Real Estate Contracts, December 31, 1939; "D", Real Estate owned, December 31, 1939; and "E", Real Estate sold, December 31, 1939, all attached to verified Report [238] and Account of Harry W. Hill, as Receiver of Intermountain Building & Loan Association, an Utah corporation, filed March 20, 1940;

19. Report and Account of Harry W. Hill, as Receiver of Intermountain Building & Loan Association, an Utah corporation, filed February 23, 1943;

Dated at Phoenix, Arizona, this 18th day of March, 1943.

HENRY S. McCLUSKEY

Attorney for Elizabeth G.

Monaghan

Received copy of the within and foregoing Amended Designation, this 18th day of March, 1943.

LOUIS B. WHITNEY

Attorney for Harry W. Hill,
as Receiver and as Trustee.

[Endorsed]: Filed Mar 18 1943. [239]

[Title of District Court and Cause.]

DESIGNATION OF ADDITIONAL PORTIONS
OF THE RECORD, PROCEEDINGS AND
EVIDENCE TO BE TRANSMITTED TO
THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE NINTH CIRCUIT
TO BE CONTAINED IN THE RECORD ON
APPEAL

To: The Clerk of the United States District Court
for the District of Arizona:

You are hereby requested, pursuant to the provisions of Federal Rule 75 (a) of Federal Rules for Civil Procedure, to incorporate into the transcript of record on appeal herein, in addition to the portions of the record indicated by appellant herein by her amended designation to be included in the transcript of the record herein, the following:

(1) All of petitioner Nealon's Exhibit No. 3, being the petition of Thomas W. Nealon for attorney's fees, excepting paragraph XL, page 41, of petitioner Nealon's Exhibit No. 3, which has already been designated by appellant, filed December 20, 1937.

(2) Petitioner Nealon's Exhibit No. 5—being the deposition of Judge Samuel L. Pattee—filed December 20, 1937.

(3) Those parts of petitioner Nealon's Exhibit No. 6, being miscellaneous bills, receipts and checks, filed December 20, 1937, particularly designated as follows:

(a) Check of Thomas W. Nealon, dated March 20, 1933, numbered 2388, drawn on The Phoenix National Bank, Phoenix, Arizona, payable to the order of Brady & Acheson in the amount of \$20.00; together with invoice of Brady & Acheson in such amount addressed to Mrs. Elizabeth G. Monaghan, dated March 15, 1933, covering "Services in re Intermountain Building & Loan Association to date".

(b) Check of Thomas W. Nealon, dated March 22, 1933, numbered 2391, drawn on The Phoenix National Bank, Phoenix, Arizona, payable to the order of Brady & Acheson in the amount of \$5.00; together with invoice of Brady & Acheson in such amount addressed to Mrs. Elizabeth G. Monaghan covering "Services in obtaining building and loan report".

(c) Check of Thomas W. Nealon, dated April 25, 1933, numbered 2439, drawn on The Phoenix National Bank, Phoenix, Arizona, payable to Elizabeth G. Monaghan in the amount of \$12.00, with notation in upper left-hand corner "Marshal's services", endorsed "Pay to Helen Erickson—E. G. Monaghan"; together with statement of United States Marshal rendered to Elizabeth G. Monaghan covering services rendered April 18, 1933, and showing receipt of payment April 26, 1933.

(d) Check of Thomas W. Nealon, dated March 23, 1933, numbered 2394, drawn on The Phoenix National Bank, Phoenix, Arizona, payable to Mrs. S. A. Nelligan in the amount of

\$5.00; and unnumbered check of Thomas W. Nealon, drawn on The Phoenix National Bank, Phoenix, Arizona, payable to Mrs. S. A. Nelligan in the amount of \$12.00; together with notation accompanying above checks "Nelligan—clerical work \$17.00).

(e) Check of Thomas W. Nealon, dated April 22, 1933, numbered 2437, drawn on The Phoenix National Bank, Phoenix, Arizona, payable to the order of Arizona Corporation Commission in the amount of \$9.00, with notation in upper left-hand corner "cert. copy of incorp Intermountain Bldg. & Loan Assn. Utah"; together with official receipt of Arizona Corporation Commission, numbered 51206, dated April 22, 1933, evidencing payment of \$9.00, made to Thomas W. Nealon, covering certified copy of articles of incorporation "In re: Intermountain Building & Loan Assn." Receipt shows payment by check No. 2437.

(f) Check of Thomas W. Nealon, dated May 22, 1933, numbered 2453, drawn on The Phoenix National Bank, Phoenix, Arizona, payable to the order of County Recorder of Maricopa County in the amount of \$3.35; together with official receipt of County Recorder dated May 22, 1933, to Thomas W. Nealon, covering certified copy of mortgage—Vaughn Riggins, et ux. to Intermountain Bldg. & Loan Assn.

(g) Unnumbered check of Thomas W. Nealon, dated May 14, 1933, drawn on The Phoenix National Bank, Phoenix, Arizona, pay-

able to the order of S. A. Nelligan in the amount of \$25.75, endorsed by S. A. Nelligan and cashed in Salt Lake City, Utah. [241]

(4) This designation.

Dated at Phoenix, Arizona, this 18th day of March, 1943.

LOUIS B. WHITNEY,

Attorney for Harry W. Hill,
as Receiver of Intermoun-
tain Building & Loan As-
sociation, an Utah corpora-
tion, Appellee.

1006 Luhrs Tower
Phoenix, Arizona.

Due service of the within, by copy, acknowledged this 18th day of March, 1943.

HENRY S. McCLUSKEY,
Attorney for Appellant.

[Endorsed]: Filed Mar. 18, 1943. [242]

[Title of District Court and Cause.]

STIPULATION RE RECORD ON APPEAL

It Is Stipulated by and between the petitioner Elizabeth G. Monaghan, through her attorney Henry S. McCluskey, Esquire, and Harry W. Hill, as Receiver of the Intermountain Building & Loan Association, an Utah corporation, through his attorney Louis B. Whitney, Esquire, that in prepar-

ing the record it will not be necessary for the clerk to include therein the hypothetical questions propounded to the witness Samuel A. Pattee in his deposition, for the reason that said hypothetical questions are identical in form and substance to those propounded to the witness William H. Burgess in his deposition, and that the same questions may be considered by the Circuit Court of Appeals for the Ninth Circuit as being asked the witness Samuel A. Pattee.

It Is Further Stipulated between the parties that the decision of the United States Circuit Court of Appeals for the Ninth Circuit, dated August 5, 1935, which is designated in appellant's designation as part of the record, need not be included by the clerk in the transcript and need not be printed by the Clerk of the Circuit Court of Appeals for the Ninth Circuit, as the same is fully reported in 78 Fed. (2d) [243] at page 972, et seq.

It Is Further Stipulated that the order of the United States Supreme Court denying writ of certiorari, reported in 206 U. S. at page 639, need not be included in the record, and may be considered by the United States Circuit Court of Appeals for the Ninth Circuit in consideration of this appeal, should said order be considered pertinent.

This stipulation is entered into for the purpose of shortening the record, and it is further stipulated that this stipulation be included in said record.

Dated at Phoenix, Arizona, this 9th day of April, 1943.

HENRY S. McCLUSKEY,
Attorney for Elizabeth G.
Monaghan, Appellant.

LOUIS B. WHITNEY,
Attorney for Harry W. Hill, Receiver of Inter-
mountain Building & Loan Association, an
Utah corporation.

[Endorsed]: Filed Apr. 9, 1943. [244]

CLERK'S CERTIFICATE TO TRANSCRIPT
OF RECORD ON APPEAL

United States of America,
District of Arizona—ss.

I, Edward W. Scruggs, Clerk of the United States District Court for the District of Arizona, do hereby certify that I am the custodian of the records, papers and files of said Court, including the records, papers and files in the case of Guadalupe R. Gallegos, et al, plaintiffs, versus Intermountain Building & Loan Association, a corporation, numbered E-268 Phoenix, on the docket of said Court.

I further certify that the attached pages, numbered 1 to 244, inclusive, contain a full, true and correct transcript of the proceedings had in said cause, and of all the papers filed therein, together with the endorsements of filing thereon, called for and designated in Appellant's Amended Designa-

tion of Parts of Record to be Transmitted to the United States Circuit Court of Appeals, and Appellee's Designation of Additional Portions of the Record, Proceedings and Evidence filed herein and made a part of the transcript attached hereto, (except portions of petitioner Nealon's Exhibit 6, the originals of which are transmitted herewith pursuant to order of the court) as the same appear from the originals of record remaining on file in my office as such Clerk, in the City of Phoenix, State and District of Arizona.

I further certify that the original Reporter's Transcript filed in said cause is transmitted herewith.

I further certify that the Clerk's fee for preparing and certifying this said transcript of record amounts to the sum of \$37.10 and that said sum has been paid to me by counsel for the appellant.

Witness my hand and the seal of said court this 21st day of April, 1943.

[Seal]

EDWARD W. SCRUGGS,

Clerk

By WM. H. LOVELESS,

Chief Deputy Clerk. [245]

[Title of District Court and Cause.]

REPORTER'S TRANSCRIPT

The above entitled and numbered cause came on duly and regularly for hearing before Hon. Dave

W. Ling, Judge, presiding without a jury, commencing at the hour of two o'clock, P. M., on the 20th day of December, 1937.

The petitioner, Thomas W. Nealon, appeared in his own behalf.

Joseph H. Morgan, attorney at law, Prescott, Arizona, appeared on behalf of petitioner Elizabeth G. Monaghan.

Thereupon the following proceedings were had:

The Clerk: No. E-268-Phoenix.

Mr. Morgan: Your Honor, I represent Mrs. Monaghan, whose petition is also filed in this matter. While separate petitions have been filed, the Monaghan petition covers both the services of Mr. Nealon and Mrs. Monaghan. I would, therefore, suggest that these two petitions be consolidated for hearing as they really constitute one matter.

The Court: Any objection to that, Judge Nealon?

Mr. Nealon: I think they should be heard separately. They both can be heard separately.

The Court: They will have to be heard separately, really.

Mr. Nealon: Yes, I think so.

The Court: But they might be consolidated?

Mr. Nealon: Oh, consolidated for the hearing?

The Court: Yes.

Mr. Nealon: Oh, yes, no objection to that.

The Court: All right. Do you want to proceed first?

Mr. Nealon: If you please. I would like to make a little statement at the opening as to why—why I

can see that the petition should have to be filed separately.

I am asking for a fee, as one of the solicitors for the plaintiffs in the class suit filed for certain named plaintiffs, and those similarly situated. I asking the Court to allow me such reasonable compensation for the services rendered [2*] to the plaintiffs, and those similarly situated, in connection with the preparation, institution and trial of the cause, including services rendered by me on the appeal from the interlocutory decree rendered by the Ninth Circuit Court of Appeals, for my services in opposing the petition of the defendant corporation and J. A. Malia in the Supreme Court of the United States, and filed upon a Writ of Certiorari, and for my out-of-pocket expenses necessarily incurred and paid by me in the sum of \$1,330.40, and for services in obtaining final decree providing for the conveyance of all the property of the Inter-mountain Building & Loan Association to the Receiver of the defendant corporation. In this matter, Mrs. E. G. Monaghan and myself were co-solicitors for the plaintiffs. In filing this separate petition on my behalf, I followed the procedure laid down in many cases of like nature to this one which have been before the Federal Courts and the Supreme Court, in which applications for fees were made, where there were more than one solicitor representing the applicants, and who were not partners. I refer to the case of *Glidden vs. Cowen*, 123

* Page numbering appearing at top of page of original Reporter's Transcript.

Fed. 48; *Thompson v. Bomar*, 258 Fed. 339. There are many other cases as well. In these cases where the solicitors [3] were not partners—the fees were allowed to each of the applicants involved.

The solicitors in this case, Mrs. Monaghan and myself are not, and have never been, partners in any sense of the word. My office in Phoenix was the headquarters for the conduct of this case. All pleadings, briefs, all other business was formulated and dictated by me and prepared in my office. All ordinary overhead expenses of the office during the whole period of this litigation was borne by me. All of the expenses of litigation from the time the matter came into my hands in the early part of 1932, to the time when the Receiver took physical possession in November, 1935, were advanced by me at the time they were incurred or paid. Of these expense, Mrs. Monaghan, on April 30th, 1934, made a deposit of \$258.00, for which she is entitled to be reimbursed by me upon payment of my out-of-pocket expenses.

Also, during the greater portion of this time; that is, during the early part of 1932, and up to about a week prior to the petition for interlocutory decree in April, 1934, Mrs. Monaghan was in my employ on a salary, but there never was at any time any partnership between us. The type of work done, the amount of work done and the time [4] spent in behalf of the plaintiffs in this suit, and the amount of overhead office expenses, and the out-of-pocket expenses necessarily paid as the preparation and the trial of the case proceeded, is only

within the knowledge of the individual performing the work, and that could only be intelligently placed before the Court in a separate petition. No one except the person rendering the service could vouch for the truth of the contents in the petition or the statement and the particular services rendered; particularly, one could not verify as to the truth of the statements in a joint petition where there was a wide divergence of opinion as to the contents in the petition form of the order, and the payment as to fees, as shown by the petition as now before the Court.

My opinion is that the only way this Honorable Court can arrive at the conclusion as to the services rendered to the plaintiffs in this case, and the value of this service is by considering the service of each of the solicitors, and the value of the service of each of those solicitors, as we done in the cases I have before cited.

My prayer in the petition is for only one-half of what would be a reasonable fee for the conduct of the case, and my petition differs from that of [5] Mrs. Monaghan in this case, in that I ask that if the Court does not see proper at this time to allow the whole fee, that it make an allowance upon account. I think the latter is proper under the circumstances of the case, and under the evidence which I shall introduce, that a partial allowance at this time is the only way in which justice can be done to all parties, considering the amount of funds in the hands of the Receiver, the necessity, I might say, of the declaring a dividend, and the fact that

it will probably be some time before all of the assets can be converted into cash. At the end of the case, at the end of the hearing I shall ask the right to file motions to that effect, and the petition along with them, so as to bring it directly before the Court, maybe supplemental to the petition already filed.

I am stating that by way of merely an introduction, if your Honor please.

As bearing upon the amounts which the Federal Courts held applicable, and do hold applicable, in cases of this kind, I have here two authenticated copies of the decrees, one made by the District Court in California, and one made by the District Court in Delaware, all properly authenticated, and I will ask that these be marked in evidence and [6] introduce them for the information of the Court.

The Court: Very well.

(The documents were marked as Nealon's Exhibits 1 and 2 in evidence.)

Mr. Nealon: I might say, if your Honor please, that I expect to call two witnesses and introduce two depositions which have been taken. In order to save the time of all parties thereto, I have submitted the hypothetical question to the witnesses here in writing beforehand.

THOMAS W. NEALON,

the petitioner in this action, being first duly sworn, testified as follows:

Mr. Nealon: My name is Thomas W. Nealon. I am one of the solicitors for the plaintiffs in the class suit in Cause No. E-268-Phoenix, in the District Court of the United States for the District of Arizona, the first class suit in which Guadalupe R. Gallegos, Francisca Gallegos, his wife, Inga G. Gudmundsen, and Mata E. Dexter, in their own and in behalf of other similarly situated, plaintiffs, and the Intermountain Building and Loan Association, a corporation, was defendant, and that suit was brought by said named plaintiffs in their own behalf and in behalf of all others similarly situated. [7]

Since 1914, I have been, and am now a member of the Bar of the Supreme Court of the State of Arizona, and of the United States District Court in and for the Federal District of Arizona, and at all times since that date have been in active practice before the State Courts of Arizona and the Federal Courts in the District of Arizona; that I am now, and have been for many years, an active member of the State Bar of California and of the United States Court of Appeals for the Ninth Circuit, and during all of said period a large portion of my practice has been upon the equity side of the Federal Court.

Some months prior to April 18th, 1933, I was employed by certain lien-holding creditors of the Intermountain Building & Loan Association, a Utah

(Testimony of Thomas W. Nealon.)

corporation, to file suit against said corporation and establish equitable liens by court decree to recover trust property from the delinquent corporation and procure the appointment of a Receiver to preserve and conserve the assets of said corporation then being wasted and dissipated by the said corporation, its officers and directors.

The plaintiffs named in the said suit were among the lien-holding creditors who employed me to institute said suit, and said suit was filed on [8] April 13th—no, April 18th, 1933, in behalf of such creditors and all others similarly situated, all parties so situated being too numerous to be made parties to the suit. The bill of complaint contained the following paragraph:

“That the plaintiffs bring this action on behalf of themselves and for all others similarly situated who desire to come in and bear their proportion of the expenses of this suit; that the persons so situated are too numerous to be made parties to this action.”

Immediately upon being employed as aforesaid, I began an investigation of the affairs of said corporation, searching all available sources of information to ascertain the financial condition of said corporation, the nature and extent of its assets and liabilities, the conduct of its officers and directors, as well as a study of the law applicable to the existing situation.

In the course of this investigation, I discovered the following: 1. That the business of the defendant corporation, the Intermountain Building &

(Testimony of Thomas W. Nealon.)

Loan Association, a Utah corporation, was being conducted in a manner that would ultimately result in the waste and dissipation of all of the assets of the corporation, and that the corporation [9] had been insolvent from about the year 1922, if not before that date, and that it was not a true building and loan association, but a fraudulent corporation; that some 3,840 persons were creditors of that association at that time; that the bulk of these creditors were people of limited means, among them widows, orphans, guardians and old people, endeavoring to safely invest \$5.50 per month and thus in the course of ten and one-half years accumulate One Thousand Dollars; that they possessed but limited business experience, which was not sufficient to enable them to analyze the complicated corporate structure of the defendant corporation, and they were influenced in making their investments by plausible propaganda presented by the corporation through newspaper articles, circulars and printed matter, as well as by high-pressure salesmen. That in the contract itself it was specifically provided that the corporation should hold in trust for each of the plaintiffs, and those similarly situated, real estate mortgages in the sum of one hundred per cent of the amount due to each of them, and that these securities in the trust fund should be subject to the constant inspection of the banking officials of Utah, or of the state in which the [10] creditor resided.

The contract contained the following provision:

(Testimony of Thomas W. Nealon.)

"Security. As security for the performance of the obligations of the Association hereunder, the Association will hold intact, subject to the constant examination and inspection of the Banking Department of the State of Utah, first mortgages on improved real estate in an amount equal to at least one hundred per cent of its liabilities hereunder, less the amount of any loans made on this and like certificates, or any certificates issued in lieu thereof."

Some of the securities issued by the corporation had that they were subject to the inspection of the Banking Commissioner, or similar official of any other state in which the corporation did business.

The investigation I made disclosed many wrongful acts committed by the Intermountain Building & Loan Association, resulting in the waste and dissipation of its assets and of the trust funds intrusted to it, and which caused the insolvency of the defendant corporation, some of which were as follows:

During a period of three and one-half years [11] there had been unlawfully paid to one M. E. Waddoups as commissions on the sale of securities of the said corporation, in many instances he receiving all that was paid into the corporation by the lender, the sum of \$482,886.00; that dividends had been paid to said Waddoups and his associates that were never earned by the corporation, and which were wrongfully paid from the trust fund belong-

(Testimony of Thomas W. Nealon.)

ing to the plaintiffs, and others similiarly situated, amounting to the sum of \$418,649.50.

That loans had been improvidently made, a large percentage of which were made in violation of the Articles of Incorporation and By-Laws of the Association, resulting in the loss of \$765,182.78, a total loss of these three items alone of \$1,666,718.28. That an exorbitant and fictitious salary, the amount being impossible to estimate, was paid to said Waddoups as President of said corporation, and had been during a long period of time, and upon a basis of \$24,000.00 per year, approximately forty-five per cent of which came from the trust fund belonging to the plaintiffs, and those similarly situated, and which were paid in violation of the Articles of Incorporation and By-Laws of the Association while said Waddoups devoted only a part of his time to the [12] business of the Intermountain Building & Loan Association. That said Waddoups dominated and controlled the said corporation absolutely from the time of its organization in Utah in 1921, until his stock therein was purchased by one Daniel Alexander in, to-wit: October, 1924, and that upon losing control of said corporation he moved from Salt Lake City, Utah, to Phoenix, Arizona, where he organized the First National Building & Loan Association, and through said latter corporation obtained control of the defendant corporation in, to-wit: August of 1930; that at all times subsequent to that date up to the time of the appointment of the Receiver herein

(Testimony of Thomas W. Nealon.)

by the United States District Court, he retained such control and manipulated its affairs for the benefit of himself and to the injury of the plaintiffs, and those similarly situated.

That said Waddoups used the funds of the Association to finance the operations of the Lincoln Mortgage Company, a company largely owned and absolutely dominated by him, and the defendant corporation suffered extreme losses through the manipulations of loans made upon buildings erected by said Lincoln Mortgage Company.

That prior to the organization of the defendant [13] corporation, said Waddoups had entered into a secret contract with one Daniel Alexander, in which it was agreed that said Alexander should be elected President of the defendant corporation, that Waddoups should not be an officer, but should receive a large commission upon all contracts issued by the corporation of similar tenor to those held by the plaintiffs, and that they were to divide these profits derived from this transaction; that Alexander had sued Waddoups for his portion under such agreement, and that Wadoups had settled said suit before it came to trial; that some of these commissions ranged as high as seven per cent upon securities: that losses of an extremely large amount, the actual figures of which cannot be obtained, were suffered by the corporation through the negligence of its officers and directors in permitting taxes to accumulate on property on which they held mortgages, some for as

(Testimony of Thomas W. Nealon.)

long as a period of ten years, and in some cases the amount of the delinquent taxes amounted to more than the value of the property. As a result of this negligence, many properties were lost through tax sales, and other properties necessarily had to be abandoned. Nor did these officers and directors of the corporation take[14] any steps in court necessary to secure the payment of such taxes from the rental value of the property.

That in the year 1931 alone, unlawful dividends paid to the President of the Association, and his associates, amounted to some \$119,312.68; that during the same period, the expenses, salaries, costs of collection, and other items ran the expense up to \$218,718.79, a sum greater than could have been collected from the interest of all the mortgages held by the corporation, and the rents from all the properties owned by the corporation. That the losses of the corporation during that period alone were probably in excess of \$240,000.00.

That the Association had paid large sums of money to withdrawing certificate-holders while it was insolvent, with the result that some of such holders had been paid in full while the plaintiffs and those similarly situated would receive, under any circumstances, only a portion of the money due them.

That the Association had, and was continuing to transfer many of its assets to other corporations; that the Association was not functioning for the purposes for which it was incorporated,

(Testimony of Thomas W. Nealon.)

that it was doing practically no new business or [15] any profitable business, and that it had lost the confidence of the public to such an extent that it could never be profitably conducted, and had lost all right to do any new business in Arizona.

My investigation further disclosed that the conduct of the officers and directors of the defendant corporation had been such that at the time your petitioner filed suit herein, the liabilities of the corporation exceeded the assets of said corporation by more than \$700,000.00, and that the corporation was hopelessly insolvent and had been so since 1922; that its paid-in capital never exceeded \$3,-460.00, and this capital was exhausted before 1922, and from that time on it traveled on money borrowed from these creditors.

That the true state of affairs of the corporation was concealed from the creditors and the public by the fact that the total liabilities upon obligations like those held by the plaintiffs, and those similarly situated, never appeared upon the books of the corporation, and further by the fact that thousands of these obligations had been written off on the records of the corporation as if they had been forfeited, there being no authority of law whatsoever upon the part of the corporation and its officers so to do. As a result [16] thereof, there were hundreds of the creditors of said corporation who were entitled to participate in this trust fund whose rights had been totally lost. A large portion of the funds so forfeited was absorbed by said

(Testimony of Thomas W. Nealon.)

Waddoups and his associates through a particular form of stock called "Expense Fund Stock", although said funds belonged in a trust fund for the purpose of protecting those who had furnished money to buy the securities.

My investigation further disclosed that the officers and the directors of the corporation spent large sums of money out of the State for the purpose of giving a preference to residents of other states in the matter of the payment of claims similar to those of the plaintiffs herein, and those similarly situated; that among these sums so taken, \$40,000.00 was sent to California in 1929, and \$50,000.0 in 1932, which sums were invested in securities that are now held in California, and that there was a similar attempt to give a preference to residents of Oregon and Wyoming, all in violation of the rights conferred upon the plaintiffs and those similarly situated.

Mr. Morgan: May I interrupt or suggest, Mr. Nealon? If the Court, please, Mr. Nealon is reading the petition which, of course, sets out [17] the facts, and with the purpose, I presume, of having the petition included, or the evidence included in the record. That petition is, in all respects, similar to the petition that has been filed, or practically in all respects similar to the petition that has been filed by Mrs. Monaghan, with the exception that she asks for one fee for both counsel, and now I understand that all of the at-

(Testimony of Thomas W. Nealon.)

torneys—at least, all of Mrs. Monaghan's attorneys have been furnished with copies of this petition or have read the same, verified petitions are now before the Court, and I wonder if it could not be considered that the petition or both petitions have been read into the record and made a part of the record? The Court, of course, will read the petition, I presume. If it would not serve the purpose if the petition were summarized. I say that in the interest of expediency.

Mr. Nealon: Mr. Morgan is mistaken, I am not reading from the petition. I am reading from the hypothetical question, copies of which I have furnished to those who have made—those whose depositions have been taken and to witnesses I have called. They are different in respects. They are more complete, though I think come more closely to following the evidence. I will state [18] I do expect to offer it at the end of this petition that I filed as evidence after I swear to its truth, so that that will be in the record also, but I think it is necessary, if your Honor please, that I testify——

The Court: (Interrupting) Do you have that all written up?

The Witness: I have it all written up.

The Court: Why don't you introduce that? I will have to read it again, it seems to me.

The Witness: Will you consider it as read?

The Court: Yes, surely, save time.

(Testimony of Thomas W. Nealon.)

The Witness: All right, then. At this time, then, if your Honor please, I will offer in evidence the petition of Thomas W. Nealon filed in this case, and ask that it be marked as an exhibit.

The Court: All right, it may be admitted.

(The document was admitted as Petitioner Nealon's Exhibit No. 3 in evidence.)

[Printer's Note: Petitioner Nealon's Exhibit No. 3 is set out on pages 108-164 of this printed record.]

Mr. Nealon: Well, at this time, then, I will introduce into evidence the deposition of Judge Samuel L. Pattee, which contains, and I so testify, the identical questions from which I have testified, contains absolutely that matter, and then I will read to you on the stand the questions and [19] answers of Judge Pattee. I will testify also that I have every reason to believe that neither Judge Pattee nor William H. Burgess are now present in town so as to make this available——

The Court: (Interrupting) Now, what are you going to read?

The Witness: Just the questions and answers. They will be quite short.

The Court: Well, all right.

The Witness: I will offer next the petition of William H. Burgess—I mean the deposition. I will read the questions and answers.

The Court: All right.

(Testimony of Thomas W. Nealon.)

The Witness: I will leave out the formal parts because your Honor will have that before you.

(Thereupon the deposition of William H. Burgess was read by the witness, after which it was offered in evidence and received as Petitioner Nealon's Exhibit No. 4 in evidence.)

[Printer's Note: Petitioner Nealon's Exhibit No. 4 is set out at pages 164-216 of this printed record.]

The Witness: Now, I offer the testimony of Judge Samuel Pattee. Do you want me to read the questions and answers on that?

The Court: I don't think it will be necessary. I will have to read it again.

The Witness: I might state he fixes this fee at \$100,000.00. He says, in his opinion, ten per [20] cent would be reasonable, but he is fixing at that sum.

(The deposition of Judge Samuel L. Pattee was received in evidence as Petitioner Nealon's Exhibit No. 5 in evidence.)

[Printer's Note: Petitioner Nealon's Exhibit No. 5 is set out at pages 216-221 of this printed record.]

The Witness: Now, I might add a little bit to the testimony in my application; that is, I have paid out all of the sums alleged in there as having been paid by me, and there was one mistake in the amount. I got a rebate of eighty-two cents, and I omitted an amount of five dollars that I paid

(Testimony of Thomas W. Nealon.)

for the getting of the opinion, but I have not changed the amount. I have here paid bills and checks on this case covering that fund with certain data, such as telegrams that are connected with it. I offer those into evidence as one exhibit, if your Honor please. You may examine it at your leisure.

(The documents were received as Petitioner Nealon's Exhibit No. 6 in evidence.)

PETITIONER NEALON'S EXHIBIT No. 6

No. 2388

Phoenix, Ariz., March 20, 1933

Pay to the Order of Brady & Acheson

Twenty and no/100..... \$20.00

Dollars

To The Phoenix National Bank,

91-3 12 Los A

Phoenix, Ariz.

THOMAS W. NEALON

[Stamped on reverse side with illegible bank stamps.]

To Brady & Acheson Dr.

Attorneys at Law

Suite 206 Kearns Building

Salt Lake City Utah

Mrs. E. G. Monaghan

Attorney at law

Prescott, Arizona

March 15, 1933

To Professional Services Rendered:

Services in re Intermountain Building and Loan Association to date.....\$20.00

Paid

vs. Harry W. Hill

305

(Testimony of Thomas W. Nealon.)

(Testimony of Thomas W. Nealon.)

No. 2391

Phoenix, Ariz., March 22 1933

\$5.00
DollarsPay to the Order of Brady & Acheson
.....Five and no/100.....To The Phoenix National Bank,
91-3 12 Los A Phoenix, Ariz.

THOMAS W NEALON

[Stamped on reverse side with illegible bank stamps.]

To Brady & Acheson Dr.
Attorneys at Law
Suite 206 Kearns Building
Salt Lake City, UtahMrs. E. G. Monaghan
Phoenix, Arizona

March 21, 1933

To Professional Services Rendered:

Services in obtaining building and loan report \$5.00

(Testimony of Thomas W. Nealon.)

Marshal	No. 2439
Services	Phoenix, Ariz. April 25, 1933
Pay to the Order of Elizabeth G. Monaghan	\$12.00
Twelve and no/100.....	Dollars
To The Phoenix National Bank,	
91-3 12 Los A	Phoenix, Ariz.
[Stamped on face: Cashed 15 (Illegible)].	THOMAS W. NEALON
[Endorsed on reverse side: Pay to Helen Erickson—E. G. Monaghan. Helen Erickson.]	
	Form No. 23
	April 24, 1933

United States of America
District of Arizona—ss.
 Elizabeth G. Monaghan
 Phoenix, Arizona

To The United States, Dr.

For Services of the United States Marshal in the Case of
 Gallegos et al. vs. Intermountain Bldg. & Loan Assn.

Marshal's Civil Date or Docket No. Writ 1933	Nature of Fees and Expenses Charged	Marshal's Fees and Expenses
2778 April 18	Service of subpoena ad respondendum	\$2.00
" "	Service of temporary restraining order	2.00
" "	Service of 4 subpoenae duces tecum at \$2.00	8.00
		<hr/>
		\$12.00

Please remit.

[Stamped: Received payment. Dist. of Arizona, Apr 26 1933. J. M. Scanlon, Chief Deputy U. S. Marshal.]

(Testimony of Thomas W. Nealon.)

No. 2394

Phoenix, Ariz. March 23, 1933

Pay to the Order of Mrs. S. A. Nelligan
 Five and no/100..... \$5.00
 Dollars

To The Phoenix National Bank,
 91-3 12 Los A Phoenix, Ariz.

THOMAS W. NEALON

[Stamped on face: NT]

[Endorsed on reverse side: Mrs. S. A. Nelligan, and stamped with bank stamps.]

No.....

Phoenix, Ariz., April 1, 1933

Pay to the Order of Mrs. S. A. Nelligan
 Twelve and no/100..... \$12.00
 Dollars

To The Phoenix National Bank,
 91-3 12 Los A Phoenix, Ariz.

THOMAS W. NEALON,

[Stamped on face: NP. 11-8; N.P. 31-10]

[Endorsed on reverse side: Mrs. S. A. Nelligan; C. L. Stack, Agent, and stamped with bank stamps.]

Nelligan clerical work

17.00

(Testimony of Thomas W. Nealon.)

Cert. Copy
 Articles of Incorp.
 Intermtn. Bldg. &
 Loan Assn. Utah
 Pay to the Order of Arizona Corporation Commission
 Nine and no/100..... \$9.00
 Dollars

No. 2437

Phoenix, Ariz. April 22, 1933

To The Phoenix National Bank,
 91-3 12 Los A Phoenix, Ariz.
 THOMAS W. NEALON

[Stamped on reverse side with bank stamps.]

Office of the
 Arizona Corporation Commission

Utah
 Thomas W. Nealon

No. 51206
 Phoenix, April 22, 1933

To the State of Arizona, Dr.
 To Filing: In re: Intermountain Bldg. & Loan Ass'n.

Official Receipt

Articles of Incorporation.....Company
 Amendment to Articles of Incorporation.....Company

(Testimony of Thomas W. Nealon.)

Appointment of Agent	Company	9.00
For Certified Copy of Articles to Incorporation ✓	Company	
For Certified Copy of Amendment	Company	
For Issuing Certificate of Incorporation	Company	
For Issuing Foreign License	Company	
For Issuing Certificate of Filing	Company	
For Issuing Certificate of Compliance	Company	
Annual Registration and Report Fees	Company	
Miscellaneous	Company	
.....		
.....		
Check # 2437		—
Received Payment,		\$9.00

ARIZONA CORPORATION COMMISSION

By PEARL SLAWSON
Clerk

All fees go to the State and must be paid in advance.

(Testimony of Thomas W. Nealon.)

No. 2453

Phoenix, Ariz., May 2, 1933

Pay to the Order of County Recorder of Maricopa County
Three and 35/100..... \$3.35
Dollars

To The Phoenix National Bank,
91-3 12 Los A Phoenix, Ariz.

THOMAS W. NEALON

[Stamped on reverse side with bank stamps.]

Recorder's Office,
Maricopa County, Arizona

Phoenix, Arizona, May 2, 1933

Thomas W. Nealon
To W. H. Linville, Recorder, Dr.
To Recording Instrument as follows:
All fees are required by law to
be paid strictly in advance before
instruments are placed on record.

Instrument	Grantor	Grantee	Fees
Cert. Copy Mtg.	Vaughn Higgins et ux.	Intermountain Bldg. & Loan Assn.	3.35

[Stamped: Paid. W. H. Linville, County Recorder.]

(Testimony of Thomas W. Nealon.)

Pay to the Order of S. A. Nelligan	No.....
.....Twenty Five and 75/100.....	Phoenix, Ariz. May 14, 1933
	\$25.75
	Dollars

To The Phoenix National Bank,	THOMAS W. NEALON
91-3 12 Los A Phoenix, Ariz.	

[Stamped on face: NT]

[Endorsed on reverse side: S. A. Nelligan ; and stamped with illegible bank stamps.]

[Endorsed] Filed Dec. 20, 1937.

(Testimony of Thomas W. Nealon.)

The Witness: Now, these services rendered to these clients include not only services in this Court, but in the State courts, proceedings there which, in my opinion, saved the fund from being transferred out of the State so this Court could never obtain jurisdiction. I have here a certified copy of the proceedings, together with a [21] letter from one of their clients, authorizing me to institute the suit. I will offer that in evidence, if your Honor please.

(The document was received as Petitioner Nealon's Exhibit No. 7 in evidence.)

The Witness: Now, my total expenses for the period of three and one-half years during which I was in the—handled this case, was some Thirteen Thousand, Seven Hundred and Fifty odd Dollars. Five Thousand, Four Hundred of that, approximately that amount was paid to Mrs. Monaghan. She had been in my employ from a period early in 1933, to the 17th day of April, 1934, just prior to the time when the decision was handed down, which I think was April 20th. That is the period in the general expenses. There is no allowance asked for that at all. I am showing the amount of the work and the risks I took in the premises. All that was paid, \$3,000.00 in Liberty Bonds, not Liberty Bonds, but Home Owners' Loan Bonds. The balance was paid by means of paying her expenses, Hotel Adams and Jefferson, and bought meals during the period she was with me there.

(Testimony of Thomas W. Nealon.)

Now, I, of course, cannot testify as to all the services that Mrs. Monaghan rendered, but she [22] did render quite valuable services, some of the most valuable part of which I don't think are included in her petition. She carried on practically all the correspondence with the plaintiffs in the cases. She made many of the investigations. One very important thing that she did in that connection was in ascertaining the citizenship of Ida May Roton, who was one of all the people to assign their claim in the first instance, and Inga G. Gudmundsen, one of the plaintiffs in here. Inga Gudmundsen was the only one that had claimed more than \$3,000.00. Had Mrs. or Miss Roton, I don't know which it is, not been a citizen of Arizona, we would not have had a jurisdictional amount; that is, could not otherwise be a party.

She did a great deal in the way of investigations of facts shown in the various suits in the State Courts, carried on practically all correspondence, and brought many of the parties into my office, and procured affidavits, and made examination of records and made an affidavit that was used in the proper cause showing the insolvency. All of this necessarily helped a great deal, but she can testify to that much more than I can.

She was present also at the hearing at San Francisco, though she did not participate in the [23] argument. She also did a good deal of research work, the amount of which I could not estimate.

[Testimony of Thomas W. Nealon.)

I might say in regard to these expenses, there are two items there which I have not receipts. One was on my expenses on the trip to San Francisco. I charged in that the actual hotel and five dollars a day for expenses. There are five days, I think it calls for. I also have charged in there for the time of my secretary while she was engaged on the briefs alone, not the general work, but on the briefs alone, and charged that on the basis of \$35 a week. At first she was only getting \$25 a week, but I made an allowance afterwards that made it \$35. I charged that on expenses paid out. If I should forget anything—should I have forgotten anything, I hope your Honor will ask me and I will supply it.

The Court: All right.

Mr. Morgan: Mr. Nealon, before you get off the stand, and in order to get it on the record, when Mr. Pattee fixed the fee of \$100,000.00, was that one-half of a reasonable fee?

The Witness: I think that is the way he intended. Ten per cent was a reasonable fee for the whole thing.

Mr. Morgan: Sir? [24]

The Witness: Ten per cent would be a reasonable fee.

Mr. Morgan: Based on Two Million Dollars?

The Witness: Yes.

Mr. Morgan: That is all. Thank you.

The Witness: The hypothetical question, he

(Testimony of Thomas W. Nealon.)

states that any trust fund recovered in excess of Two Million Dollars.

(The witness was excused.)

Mr. Nealon: Will Mr. Dougherty take the stand, please?

M. J. DOUGHERTY

was called as a witness on behalf of Petitioner Nealon, and being first duly sworn, testified as follows:

Direct Examination

Mr. Nealon:

Q. State your name to the Court, please.

A. M. J. Dougherty.

Q. And you have been a resident of Maricopa County how long, Mr. Dougherty?

A. Twenty-eight years.

Q. And have been a member of the Bar of this Court for how long?

A. Twenty-eight years. [25]

Q. You have been in active practice all of that time?

A. Except during the past year of my illness, yes.

Q. And you are a member of the Bar of the Ninth Circuit Court of Appeals? A. Yes.

Q. And the Supreme Court of the United States? A. Yes.

Q. You have handled litigation in which the

(Testimony of M. J. Dougherty.)

amounts involved were in excess of a Million Dollars?

A. Yes.

Q. Was some of that litigation in the nature of class suits, or involved the same kind of issues?

A. Yes, they were. They involved a great many questions with a great many persons, and to some extent they involved classes.

Q. Was that litigation conducted in this Court, Mr. Dougherty?

A. One of them was, one suit.

Q. You are familiar with the fees usually charged by attorneys in Arizona?

A. Yes, I believe I am.

Q. You have read the hypothetical question that has been incorporated into the record here, [26] have you not?

A. Yes, I have.

Q. And how long have you known the Petitioner Nealon?

A. For something over twenty-five years.

Q. And state to the Court your opinion of his standing as a lawyer, and so forth.

A. Well, I have always regarded Mr. Nealon as an attorney of exceptional qualifications, a man who—an attorney who would give very close attention to any business which he handled; very faithful to the interests of his clients, and a very industrious practitioner; a man of unquestionable standing and honesty; has a very high regard by the members of the Bar, and by the citizens of the County, as indicated by his practice.

(Testimony of M. J. Dougherty.)

Q. You have been associated with me in cases, and have been against me in cases, have you not?

A. Yes, both ways, parts of the way, sometimes on one side, sometimes on the other.

Q. Now, in answer to the hypothetical question which has been submitted to you, state what, in your opinion, would be a proper fee in the premises?

A. I think that ten per cent of the amount [27] recovered would be a reasonable fee.

Q. Now, will you state your reasons for that opinion, please?

A. Yes. I have always regarded the nature of the litigation involved, the complexity of the legal questions; the risks involved, and the time element all enters very materially into the consideration of the fee. In cases of this kind I, after reading over that explanation of the work done, it cannot help but impress anyone who reads it the length of time required to prosecute the litigation to an approaching end. A great number of interviews and conferences that it must have involved, and the exceptional amount of time required.

I am more or less familiar with the litigation independent of this question that has been submitted to me. I have a number of clients who have held obligations to that company. None of them held enough to warrant a separate procedure. Any one of them would have been very fortunate if they could have induced any attorney to handle their matter for ten per cent of the amount involved, and they were unable to do so because no attorney would

(Testimony of M. J. Dougherty.)

take it for ten per cent, but they would be very fortunate if they could have gotten [28] it for ten percent. I think, as a matter of fact, they would be fortunate if it could be handled; in fact, no less fortunately as an aggregation.

The complexity of the questions involved is really astounding. It involves not only questions arising in the field of law, but in accounting and corporate practices, statutory constructions, that you need only be an attorney with the knowledge of corporation procedure which would follow the ramifications which this Company took in its business, and only one with a fairly comprehensive knowledge of accounting would be able to piece the transactions together to make it a complete picture.

In all fields of human endeavor, as far as I know, the risk very materially determines the charge for services, whether it be by interest or in any other way. Of course, a case of this kind involves a great risk.

We often take cases which we have to carry through for probably two or three years, with the possibility that the entire time will be lost if the case is unsuccessful, and I think that is the case here, that the risk involved materially entered into the consideration. A case of this kind, when it comes into an office, it occupies [29] the attention of an attorney not only when he is actually working on it, but he has the case on his mind as long as it stays in the office, and it is substantially true to say it remains on his mind as a part of his active thoughts during all the time it remains uncom-

(Testimony of M. J. Dougherty.)

pleted in his office. Only professional men who have had experience with cases of this kind realize the amount of time an attorney puts upon the case outside of his office, and outside interviews and conferences. It seems to me that it required professional services, professional skill, I'd say, of the very highest order to have followed this case as closely as was necessary to bring it to a conclusion. In the first place, there were fundamental questions involved there that would decide the success or failure of the case in the beginning, not to mention anything about procedural questions or questions on adjective law. Upon the whole, on reading that through, I would regard it as an exceptional case, and one that is very creditable to Mr. Nealon and whoever was associated with him in the case. I am sure that nothing more could have been honored for those involved than what the final judgment in this case will include. When I say ten per cent, it [30] is not a stereotyped expression. I say if any one of those clients had come to any lawyer in Maricopa County and said, "Will you handle my matter for ten per cent?", they would be disappointed because no lawyer in this State would have taken that account for ten per cent and do it. Now, when he gets the same result in the aggregate, there isn't any reason that I can see why he should not be paid ten per cent, and that would be a very moderate fee.

Mr. Nealon: Does the Court wish to ask any questions?

The Court: No.

(Testimony of M. J. Dougherty.)

Mr. Nealon: Thank you, Mr. Dougherty.

(The witness was excused.)

Mr. Nealon: Judge Jenckes, take the stand, please.

JOSEPH S. JENCKES,

a witness on behalf of Petitioner Nealon, was duly sworn, and testified as follows:

Direct Examination

Mr. Nealon:

Q. State your name, please.

A. Joseph S. Jenckes.

Q. You are resident of Maricopa County for [31] how long, Judge Jenckes?

A. Thirty years.

Q. You were former Judge of the Superior Court of the State of Arizona and the County of Maricopa, were you not? A. I was.

Q. How long did you serve in that capacity, please? A. Ten years.

Q. And in that capacity did you have the handling of many equity cases, including receiverships, and so forth?

A. Well, some. I wouldn't say many, but some.

Q. You have handled many equity cases?

A. Well, I guess there were equity cases. It is hard to distinguish what are equity cases in the Superior Court.

Q. You are a member of this Court and the Bar of this Court for how long?

(Testimony of Joseph S. Jenckes.)

A. Twenty-five years.

Q. And have been a member of the Bar of the Ninth Circuit Court of Appeals approximately the same time?

A. Well, 1917, I think was the first case I handled and went there on.

Q. You had some knowledge of this case and of [32] the Waddoups group of Building & Loan Associations while you were upon the Superior Court bench?

A. Yes, I first learned of this Building & Loan Association, so-called, I think in 1931.

Q. So that you have a knowledge in regard to these cases outside of that incorporated into the hypothetical question? A. Yes.

Q. That question has been submitted to you and you have read it? A. Yes.

Q. How long have you known the Petitioner Nealon?

A. Well, I think it has been about twenty years, might have been twenty-two. Ever since you came here, as I recall.

Q. For your information, I came in 1914. I have practiced in your Court? A. Yes.

Q. We have been associated together in some cases and opposed in some cases? A. Yes.

Q. Will you state your opinion to the Court as to my standing as a lawyer, and so forth?

A. Why, I think the standing of Mr. Nealon as a lawyer in this community is of the highest, both

(Testimony of Joseph S. Jenckes.)

[33] as to his character and as to his ability as a lawyer.

Q. In the submitting of the hypothetical question to you, will you please answer as to what fees you would deem reasonable in the premises for the services rendered?

A. Yes. The hypothetical question directed my attention particularly to the services rendered by Mr. Nealon, but I gathered from reading the question that those services were rendered by him in conjunction with his associate, Mrs. Monaghan, and I have considered the whole proposition as a joint proposition; that is, services rendered by counsel for the plaintiffs in this case, and I believe, I find—I heard Mr. Nealon state a short time ago that he was asking for compensation for himself of one-half of that, so I base—it would be hard, it would be difficult to segregate the services rendered by Mr. Nealon from those rendered jointly by himself and Mrs. Monaghan, so I will consider the proposition as a joint proposition first and say that I believe a fee of ten per cent of the amount recovered, which is upwards of Two Million Dollars, would be a very reasonable fee for counsel for the plaintiffs, and as Mr. Nealon is asking for half of the fee of counsel [34] for the plaintiffs, I'd say that my answer to the hypothetical questions would be that \$100,000.00 would be reasonable.

Q. Now, will you state the reason for your opinion in fixing that valuation, please?

A. Well, a case of that kind, if you will read

(Testimony of Joseph S. Jenckes.)

this hypothetical question, and if you know something of these so-called building and loan associations and what has happened to them in the past few years, one would regard an action of this kind largely as a salvage proposition, that it is a good deal like salvaging a wreck at sea. It is a wreck, and it is gone unless somebody interests themselves enough in it to go after it and try to recover some of it, and this particular wreck, it appears, was in the situation, or it was until Mr. Nealon and Mrs. Monaghan got into the picture. It is like the situation that exists with the *Lusitania*. It is at the bottom of the ocean, and in order to salvage it, you have got to expend a lot of energy. Mr. Nealon and Mrs. Monaghan have expended that time and energy and raised this wreck to the surface, and succeeded in recovering for those creditors Two Million Dollars which, otherwise, they would not have had, and I believe that if they had contacted the whole bunch of [35] creditors and made a contract with them in the beginning, they would have been justified in charging them fifty per cent at least for salvaging whatever they could, and that certainly ten per cent is a very, very modest fee for what they have accomplished. The time and energy expended upon it is all contained in the hypothetical question. If they had not recovered, their services would have been entirely lost to themselves, three years of labor for nothing, and that, of course, is always taken into consideration in questions of this kind, labor expended of 586 days

(Testimony of Joseph S. Jenckes.)

in court, I believe that is what is stated in the hypothetical question.

Q. In the preparation of briefs.

A. Preparation of briefs and attendance in court, that in itself, if paid for without the risk of being lost because of any contingency, in itself would be worth a hundred dollars a day, or \$558,-600.00.

Q. I think you have got your figures too high as to the days.

A. Well, I haven't, Judge, in the hypothetical question——

Q. (Interrupting) I think you are right. I didn't realize that. [36] A. Yes.

Q. That was court days, 500 days.

A. Yes. I don't have any hesitation at all in saying that I am well satisfied that the services rendered in this case was worth ten per cent, and Mr. Nealon's services, if he says he has to have half, I would say his services were well worth a hundred thousand dollars.

Mr. Nealon: Does the Court care to ask any questions?

The Court: No.

(The witness was excused.)

Mr. Nealon: I think that is all I want to put in. At the close of the case I want to offer a couple of motions for petitions.

The Court: All right.

Mr. Morgan: May the applicant proceed, your Honor, with the petition of Elizabeth G. Monaghan?

The Court: We will take a brief recess before you proceed.

(A short recess was taken, after which all parties, as noted by the Clerk's record, being present, the hearing resumed as follows:)

Mr. Morgan: May Mrs. Monaghan be sworn?

[37]

ELIZABETH G. MONAGHAN,

a witness in her own behalf, was duly sworn and testified as follows:

Direct Examination

Mr. Morgan:

Q. Your name for the record, please?

A. Elizabeth G. Monaghan.

Q. Where do you reside?

A. Prescott, Arizona.

Q. What is your profession?

A. Attorney.

Q. When were you first admitted?

A. In——

Q. (Interrupting) What year? A. 1923.

Q. Where were you admitted, in Arizona?

A. In Arizona, yes.

Q. Are you admitted in other states?

A. California.

Q. You are also admitted, of course, to practice in the Federal Courts?

(Testimony of Elizabeth G. Monaghan.)

A. I am admitted to practice in the Federal Courts of Arizona, and the Ninth Circuit Court.

Q. Prior to your admission to the Bar, did you have any legal experience?

A. Yes, I have been legal secretary and law clerk since 1912. [38]

Q. Continuously to 1923?

A. Continuously.

Q. Since the year 1923, were you connected in the general practice of law, and if so, where?

A. In Prescott and Phoenix.

Q. In a general way, what does your practice consist of?

A. Just general, Mr. Morgan; equity and law, probating contested wills; bankruptcy. I had some receivership experience.

Q. Have you had any—Prior to the institution of the present action, did you have any special experience on practice in connection with receivership proceedings.

A. Yes, I did, in connection with the Jerome-Portland receiverships. I think there were several cases in that group.

Q. Was that a class case?

A. That was a class suit. I think it involved something—well, it was a million, five or six hundred thousand dollars in that. I think it was recovered.

Q. After your admission to the Bar, you worked on this case?

A. I worked on this case while I was in your office.

(Testimony of Elizabeth G. Monaghan.)

Q. Did you have any special experience in [39] other receivership cases?

A. Well, yes, while I was assistant to Mr. Joseph H. Morgan in the Coburn Receivership in 1925 and 1926.

Q. Do you recall in what counties those receiverships were filed?

A. It was Yavapai, Graham, Gila—there was another one, Mohave.

Q. What was the total amount involved in this receivership?

A. Something like a million and a half.

Q. During the year 1932, were you employed by the creditors of the Intermountain Building & Loan Association?

A. I was, Mr. Morgan.

Q. Particularly the plaintiffs in this action?

A. Yes, and more directly by others prior to these plaintiffs, Mr. Morgan.

Q. During the year 1932, did you do any work in connection with the Intermountain—

A. (Interrupting) Oh, a great deal, in the early part of 1932.

Q. And during all of 1932, did you work on those matters?

A. All of 1932 and of 1933, practically all of 1934. [40]

Q. And approximately how many creditors?

A. Did I have personally?

Q. Had you employed?

A. I know the—

(Testimony of Elizabeth G. Monaghan.)

Q. (Interrupting) I don't mean in the present procedure, but I mean in connection with the——

A. (Interrupting) Oh, forty to fifty.

Q. Later on were you specially employed by the plaintiffs in this action?

A. Yes, I had been employed by them just in a general way.

Q. Written authority given to you to file the action? A. Yes, sir.

Q. I hand you three separate documents, one signed by Guadalupe Gallegos, another by Inga G. Gudmundsen, and one by Mata E. Dexter.

A. There was another one, Francisca Gallegos also.

Q. Are these the instruments that authorized you to bring in appropriate action?

A. Yes.

Mr. Morgan: We offer those in evidence, your Honor, as one exhibit.

(The documents were received as Petitioner Monaghan's Exhibit A in evidence.) [41]

Mr. Morgan: I will state for the purpose of the record, they authorize Mrs. Monaghan to institute action against the Intermountain Building & Loan Association, and also authorized her to employ associate counsel.

Q. Following the authorization by these particular plaintiffs, did you bring an action?

A. Yes, I did, April 19th, 1933.

(Testimony of Elizabeth G. Monaghan.)

Q. The record shows that you were the sole solicitor in that case?

A. Yes, but I'd like to explain that.

Q. You can make any explanation you see fit.

A. Those clients of mine, and many others that I had, I had discussed the matter with Mr. Nealon on numerous occasions. I asked him if he would join with me in these proceedings, and he said he would advise me and help me all he could, but he did not want to be an attorney in the matter. It later developed I just had to have someone for the court work, and I knew how good he was, and he joined me then some time subsequent to June, 1933.

Q. I believe the amended bill of complaint upon which that Receiver was finally appointed in this case was filed——

A. (Interrupting) June 23rd, 1933.

Q. At that time Mr. Nealon was not associated [42] in the case?

A. Not as attorney.

Q. As solicitor of record? A. No.

Q. Later on he did become associated in the record?

A. Yes, after I had to——

Q. (Interrupting) Mr. Nealon said something to the effect that you were employed by him in 1932. Was that employment in connection with this particular case?

A. Oh, no, it was some law and special work. I could have brought my letter I had. I think I have a

(Testimony of Elizabeth G. Monaghan.)

copy of it, just two or three days a week. I'd just come down on occasions.

Q. You were working on other cases for him?

A. Other cases, yes. This case was my own case. I brought this down with me when I came. It originated in Prescott.

Q. You have filed a petition in this case which I believe practically in all respects is similar to the petition which was filed by Mr. Nealon except you expect one fee to be allowed both for yourself and Mr. Nealon, is that right?

A. That is right.

Q. I believe you also include the statements [43] to the effect that you and Mr. Nealon employed Mr. James H. Smith, an accountant, to assist you in the work?

A. Yes, sir; it was necessary. We were not accountants, and the nature of this case absolutely precluded us from getting the information that we should have had in order to prove our case without a certified public accountant, and a good one at that.

Q. Did you verify the petition you have filed?

A. I have.

Q. You, at this time, swear to that petition as to the truth of the facts therein stated? A. I do.

Q. What, if any, arrangements did you have with Mr. Nealon at the time you associated with him in the case as to any fees you might recover?

A. The agreement was we would split fifty-fifty, he to do the work of briefing; that is, dictating of them. I realized he was much more familiar with it

(Testimony of Elizabeth G. Monaghan.)

than I was. As to the detail work, I did practically ninety per cent of it, which was all right. It was a joint venture. What we did, we did as a joint venture, what one did. The other didn't do anything without consulting with him, that we didn't go over pro and [44] con, go over it nights and days. There was nothing done that was not consulted and talked over, I with him and he with me.

Q. At the time you were employed in this case, did these clients pay you any fee?

A. No.

Q. Were any of them able to pay you any fee?

A. No, they were not, Mr. Morgan. Most of the clients were in moderate circumstances.

Q. Just briefly, will you state upon what general investigation you base your facts for the appointment of a Receiver, just briefly, now.

A. Well, I believe, really, Mr. Morgan, that it would better suit the purpose of the Court if you will just incorporate my petition, because I think I have set that out very clearly in here. Of course, the proceedings that went on, Mr. Nealon set that out, but in regard to the actual work and the investigation, it is just impossible to detail each little bit of work.

Q. What, if any, trips did you make ascertaining—in a general way what was the investigation you personally made prior to the institution of this action?

A. Oh, I checked every mortgage that these people had in Arizona and in Utah. I checked every [45] piece of property there. I went to Utah and exam-

(Testimony of Elizabeth G. Monaghan.)

ined all the records up there. We secured copies of their reports. My sister got them from Salt Lake. We checked them and we found that these reports, what we called them and what Mr. Smith advised us were "Cover-up Reports", they did not reflect the true situation of the Company. We found that Mr. Wad-doups and the other members of the firm were being paid exorbitant salaries. We found dividends were being paid out of surplus and not profits.

Q. I believe that is all shown in your petition?

A. That is all shown in my petition.

Q. How much time did you actually put in on your investigation and your work in connection with this case?

A. Now, based on Mr. Nealon's statement of five hours a day as a legal day, I think I put in five hours a day actually covering two and a half years, nights, Sundays, holidays and days.

Q. That is to say, two and a half years continuous work?

A. Yes. Of course, there was a little time out that I went to Chicago on the National Convention that I didn't spend any time there, but I [46] was helping to elect our beloved President, so I think I will be excused.

Q. May I present these telegrams to you? Those are the telegrams to Mr. Nealon?

A. Those are telegrams from Mr. Nealon to me.

Q. Oh, telegrams from Mr. Nealon to you?

A. That was in reference to clients that I had

(Testimony of Elizabeth G. Monaghan.)

at the time I went to Chicago. I had been trying to get some settlement out of the Company, and couldn't get anything. I think Mr. Nealon has that set out on Page 11 of his brief.

Q. I notice in one of these wires he asked for authority to take some action?

A. Yes, I authorized him to bring suit that we spoke of here in order to protect the assets and keep them from going out of the State.

Q. When was the final decree entered in this case? A. In September, 1936.

Q. How many pages of pleadings, records, did you assist in preparing and file in Court?

A. Just a rough estimate in going through the files, I find there were approximately a thousand pages of legal work. That is just that originated out of our side.

Q. Did you, yourself, join in that work? [47]

A. Oh, yes, all of it, and a great many of the intermediate briefs, preliminary briefs I wrote myself without any assistance of the stenographer. I mean, I just typed them in my office.

Q. You worked up the law in your office?

A. Oh yes, we did together.

Q. Mr. Nealon appeared jointly in court?

A. Oh, yes, he did, did a lot of law work, but even his work, law cases that he looked up, it was discussed with me, law cases I looked up, every point in the proceedings.

Q. Have you the total pages of the briefs?

(Testimony of Elizabeth G. Monaghan.)

A. No, I haven't, that is just the pleadings. Briefs, I don't know, they were rather extensive. Mr. Nealon dictated all the briefs.

Q. How many pages that were filed by the Association did you have to review?

A. I checked it through their records, it was around 700 pages, exclusive of the briefs in the Circuit Court.

Q. Now, Mrs. Monaghan, for the services of yourself and Mr. Nealon, what do you state would be a reasonable fee, taking into consideration the fact your fee was to be paid on a contingent basis entirely?

A. Well, of course, I am not as well versed [48] on those matters as these gentlemen are, Mr. Morgan, but when you say that you would not take a case of, say, five or six hundred days for ten per cent, that is true. You know that when you get a big aggregate of cases, one always takes it for less than on the single collection, but my estimation of what was done, it is just absolutely impossible to tell the amount of work digging and plugging that we did, all of us, Mr. Nealon, Mr. Smith and myself. Well, I would hate to think the Court would allow us less than \$150,000.00.

Q. Are you familiar with the allowance made in the Coburn case and the other cases?

A. Yes, I believe, if I remember, Mr. Morgan, in that Coburn Receivership that we handled, there was recovered, well, the assets, I think, totaled around a million and a half. There was only about half of that recovered, and a fee of \$50,000.00 was allowed, and

(Testimony of Elizabeth G. Monaghan.)

about Twenty-five Thousand in the Jerome-Portland.

Q. Now, in your petition you speak about the employment of Mr. Smith? A. Yes.

Q. Briefly, state how that came, the employment came about.

A. Well—— [49]

Q. (Interrupting) What was done with Mr. Smith?

A. The nature of this suit, it was just as much accounting in the beginning as it was the law. Of course, it developed later into the law questions, but in the beginning we just had to have an expert accountant to get us started on the reports, to see how to break them down, to estimate the cost of money to the Association; to see whether they were making any money or not. Of course, I don't really understand a lot of accounting, but I know that we just had to have his services or we could not have gotten started, that is all.

Q. Do you know about how many days Mr. Smith put on this work? A. Oh, goodness.

Q. Approximately?

A. Oh, I don't know. I think he set up here days and days, 150—200 days.

Q. And how was he to be paid, Mr. Smith to be paid?

A. My agreement with Mr. Smith was after I talked the matter over with him, it was on a contingent basis. If we won out and a Receiver was appointed, we would petition the Court for a reasona-

(Testimony of Elizabeth G. Monaghan.)

ble fee. He took the chance; that is, if [50] we lost, he wouldn't get it.

Q. After Mr. Nealon was associated in the case with you, did he also confirm that agreement with Mr. Smith?

A. Oh, yes, most of the work was done, of course, the detail and the breaking down of the reports, that was done with Mr. Nealon's knowledge.

Q. You have had considerable knowledge——

A. (Interrupting) Yes, but not the type of accounting that was necessary in this case.

Q. From your own knowledge of what Mr. Smith has done, what would you say would be a reasonable fee for his services?

A. I think an estimate of \$10,000.00 was a reasonable estimation, if I know the value of the work to us.

Q. What was the total amount, if you know, that was recovered and placed in the care and custody of the Court?

A. Well, according to the book record, it was Two Million, Seven Hundred and some odd thousand dollars, but they discounted for loss on realization about Six or Seven Hundred Thousand Dollars of that, so it was a little over Two Million Dollars. That is, the loss had not been taken yet, but they considered it would be lost. [51]

Q. Does your petition show the complications that arose out of this case by reason of the intervention of one Malia who was Superintendent of Banks in Utah?

(Testimony of Elizabeth G. Monaghan.)

A. Yes, that is set out very clearly in both my petition and Mr. Nealon's.

Q. Did that add much to your work?

A. Very much. Mr. Morgan, there wasn't one attorney in this State, including yourself and Mr. Gust, that said we had a leg to stand on. We just had to fight every inch of the way and fight——

Q. (Interrupting) In other words, this was an extremely hazardous case?

A. It certainly was, and everybody told us we were hanging by our eyebrows.

Q. I think you folks were told that by a half dozen lawyers?

A. Oh, by a half dozen firms in this town and in Utah.

Mr. Morgan: At this time we offer as a part of the records the verified petition of Mrs. Monaghan, which is filed in the record here, which details the facts——

The Court: All right.

Mr. Morgan: Your verified petition, or copies of that petition, has been presented to the [52] attorneys that you have called to testify?

A. Yes, sir.

Mr. Morgan: I believe that is all unless you have something further, unless the Court desires——

The Court: No questions.

(The witness was excused.)

(The document was received as Petitioner Monaghan's Exhibit B in evidence.)

[Printer's Note: Petitioner Monaghan's Exhibit B is set out on pages 43-108 of this printed record.]

Mr. Morgan: Mr. Gust. At this time while I think about it, if your Honor please, on behalf of the Petitioner, Elizabeth G. Monaghan, we adopt the testimony offered on behalf of the Petitioner Thomas Nealon, in so far as it is applicable to Mrs. Monaghan's petition, that one fee should be allowed, and for the purpose of showing the services of Mr. Nealon, as he has testified.

The Court: All right.

JOHN L. GUST

was called as a witness on behalf of the Petitioner Monaghan, and being first duly sworn, testified as follows:

Direct Examination

Mr. Morgan:

Q. Your name, please?

A. John L. Gust.

Q. Your profession? [53]

A. Lawyer.

Q. I believe you have practiced law in the State of Arizona?

A. Since 1909.

Q. You are a resident of Phoenix?

A. Yes.

Q. You are also admitted, I take it, in the various United States Courts, and I believe in the United States Supreme Court?

A. I am.

(Testimony of John L. Gust.)

Q. Your practice covers a very wide field?

A. Yes, it covers many different subjects.

Q. You have been involved in numerous receiverships, I presume?

A. Some, in various ways.

Q. In connection with your law practice, I presume you have considerable knowledge of what fees should be allowed attorneys in cases?

A. Well, I have knowledge of what fees they asked for and what fees they got.

Q. Is an attorney entitled to a greater fee when a case is taken on a contingent basis than where he is regularly retained?

A. Oh, undoubtedly.

Q. Why is that?

A. Because of the hazard he takes in getting [54] anything. If he takes a case on a contingent fee, why, he may recover a fee, and, of course, he may get nothing. Very often he gets nothing.

Q. How much more, in your opinion, should be charged for a fee collected by one who takes a case on a contingent fee and is successful, than one who would be regularly retained and paid in advance?

A. That would depend on the nature of the case. I think in ordinary cases I have observed that were taken on a contingent fee, I think it would be about three times the straight fee, but that does not apply in this case, in my opinion.

Q. Where the case is hazardous, the contingent

(Testimony of John L. Gust.)

fee is greater, and therefore the fee should be greater? A. It should, yes.

Q. Outside of what you have heard in Court and what you may have read in the petition in this case, do you know something about the hazards of this particular case, the legal questions involved?

A. Yes, quite a bit, because this case came to me several times as attorney for the Valley Bank, when the question was raised as to whether the Bank should recognize Malia and others with reference to handling of the funds—with reference [55] to removing funds, or the possible removing of funds out of this State, and at that time, while I advised the Bank to hold onto the money, I did come to the conclusion, and to Mrs. Monaghan, I said to her that the plaintiffs' chances were very slim.

Q. Have you read Mrs. Monaghan's verified petition detailing the work that was done by her and her associate? A. Yes.

Q. Now, assuming that Mr. Nealon's petition is practically the same as Mrs. Monaghan's, and also taking into consideration the testimony of Mr. Nealon on the stand, and Mrs. Monaghan, any knowledge that you may have of their ability; the fact that the work was all done on a contingent basis; this case was highly hazardous, that it involved litigation and work consuming approximately three and a half years time, also taking into consideration the court proceedings which have been testified to, the difficulties encountered, the ob-

(Testimony of John L. Gust.)

stacles interposed, including the intervention of the Bank Commissioner of Utah, Malia, which you have just mentioned, appeals to the Circuit Court of Appeals, and the United States Supreme Court, and the difficult questions [56] involved, and that as a result of these attorneys' efforts, the assets amounting to approximately Two Million Dollars have been impounded in Court for the benefit of all creditors of the Association, what, in your judgment, would be a reasonable fee for such services?

A. Mr. Morgan, I think you made an error there in your statement of your time. I believe, according to Mrs. Monaghan's testimony, and Mr. Nealon's too, it was about two and a half years actually involved.

Q. Well, it covered a period of three and a half years, but two and one-half years continuous work, 1932 to 1936?

A. Yes. Well, I listened to the testimony of the attorneys who testified for Mr. Nealon and also the depositions, and I reached the conclusion that \$150,000.00 for the total fee of the two would be about right.

Q. Now, assuming that this petition of Mrs. Monaghan is to be considered separately from the petition of Mr. Nealon, what would you have to say as to the fee that should be allowed Mrs. Monaghan separately?

A. I don't believe I am able to separate those two fees. I think that work was so interwoven

(Testimony of John L. Gust.)

[57] that in my own mind I am not able to determine what should be allowed to one and separately, but I understood the testimony given here that that question was not involved.

Q. Now, explain, if you wish, any additional basis for your testimony that the fee should be about \$150,000.00.

A. Well, I figured this over in several ways. I have looked up in other connections the fees that have been allowed by Courts of Equity, in the Federal Courts and also the State Courts somewhat. I find that the figure, the percentage that has been given here on the stand of ten per cent involving large amounts like this is quite generally taken as a sort of a basis. I figure that that would mean a fee of about \$200,000.00 in this case for the total fee, which was the testimony, I believe, of Mr. Burgess, the deposition Mr. Nealon introduced in evidence here, but I went a step further and figured this, that if this fee was to be paid now before there is to be a final distribution of the funds in this case, that maybe the present inventory value might not be fully realized, and there might be some shrinkage in there, so I made a deduction there in arriving at the figure, because I think it would [58] be advisable to reach a definite figure, and I made some deduction there, and I reached the figure of \$150,000.00. I don't think I could very well go below that. I notice these other lawyers testifying that they had been engaged in cases involving more than a million dollars, and I have—I'd have to say

(Testimony of John L. Gust.)

that I never did have a case like this involving that amount of money. I have never received a fee such as I am testifying to here myself in my own practice. I will say this, however, that my practice is pretty steady and consistent, and fairly sure of remuneration, and I have had the opportunity to engage in cases of this kind, and looked as slim as this, and I didn't take them because I didn't think I could afford to, because I figured I could not spend the time that was necessary, and take the chance to recover that fee. I guess I haven't enough of the gambling spirit to do that, but I figure this fee principally in this way:

Suppose you take Mr. Nealon and Mrs. Monaghan, both together, and putting in the time as Mr. Nealon testified here, two and a half years steady time on this proposition without any compensation. Certainly, on the basis of ordinary everyday law work, receiving their compensation not on a [59] contingency, but as a certainty, those two lawyers, their services should be worth Fifteen Thousand a year. I have had quite a little to do with just that kind of practice. I have some lawyers in my own employ. I know that there are other firms here that do, and I know something about what is supposed to be the proper compensation for a lawyer. While it is a fact that during this period of time involved here, a lawyer's compensation has not been so great, but still I will say that anybody can see that the combined services of those two people would be at least worth

(Testimony of John L. Gust.)

Fifteen Thousand a year. Now, if you will take that for two and a half years there, that makes \$37,500.00. That would be not on a contingency.

I testified here that I thought in the ordinary case the ordinary contingency fee, the contingent fee should be about three times the regular fee. I will say in this case it could not possibly be less than five, because this had many elements of uncertainty. The fact of the matter was, that they had no evidence to begin with. They had to go out and dig up this evidence, and that was a difficult job, and which I believe Mrs. Monaghan put in a great deal of time. [60]

They succeeded in getting that evidence and enough to convince the Court to make an appointment of a Receiver. About the time that was done Malia had come into the picture. The decisions at that time were such that one had every reason to believe that Malia would be permitted to administer this property in the way he was proposing to do. That was the reason I thought they had no chance, because of that proposition primarily.

They proved the negligence on the part of Malia, according to the decision of the Courts. In that they may have been lucky, or they may have been better lawyers than the rest of us, I don't know which it was, but in either event, I think if it was because of their greater ability, they are entitled to compensation, or because of their luck, they still are.

(Testimony of John L. Gust.)

I figure in this case the percentage should be no less than five times what a straight fee would be, and if you figure five times \$37,000.00, you get close to the Two Hundred Thousand again, and then, as I say, on the matter of making some deduction again to be sure you are not making it too high, why, I get somewhere around \$150,000.00 again by that method of reasoning.

I hadn't thought of it before, but I was [61] impressed by the illustration that Mr. Dougherty gave on the stand, which I think is right, that those creditors, because they were fortunate in having their cases combined and getting a fair and better deal than they would if they had employed their own counsel. Their case could not have been handled at all, and would have cost them much more, and would have been called to put up a very higher percentage.

Mr. Morgan: Thank you, very much. Any questions, your Honor?

The Court: No.

Mr. Morgan: Q. Mr. Gust, how long have you known Mrs. Monaghan?

A. Oh, I have known Mrs. Monaghan, I think I met her before she was admitted. At any rate, I have known her ever since she was admitted.

Q. You have observed her work, I presume, Mr. Gust?

A. Yes, I have quite a bit.

Q. You consider her an attorney of ability?

A. I do.

Q. And integrity?

(Testimony of John L. Gust.)

A. Yes, and of special ability to do the kind of work she did here. She generally goes after you once she starts after you pretty hard, as she [62] did in this case.

(The witness was excused.)

FRANCIS D. CRABLE

was called as a witness on behalf of the Petitioner Monaghan, and being first duly sworn, testified as follows:

Direct Examination

Mr. Morgan:

Q. Your name?

A. Francis D. Crable.

Q. Where do you reside, Mr. Crable?

A. Prescott, Arizona.

Q. You are a practicing attorney?

A. Yes.

Q. How long have you been practicing?

A. A little over twenty-five years.

Q. During all of that period in Arizona?

A. Yes.

Q. I presume you are admitted in California too?

A. Yes.

Q. And in all the Federal Courts?

A. Except the Supreme Court of the United States.

Q. Now, during your practice have you been in-

(Testimony of Francis D. Crable.)

volved in cases of some magnitude involving a [63] million dollars? A. Yes.

Q. Would you mind detailing some of those cases?

A. Some receiverships, and in contested will matters, and in general practice, Mr. Morgan, not all a million dollars, however, that is an exception.

Q. I believe you were employed in the Lowell Estate?

A. I represented the Trustee in the Lowell Estate.

Q. That involved a million and a half?

A. More than that.

Q. Two million dollars.

A. Just about two.

Q. You have also been the attorney for the Receiver on the appeal in the Arizona Power Company matter?

A. Yes, I was also trustee there.

Q. You are familiar, then, with fees in cases of this character? A. Yes, I think so.

Q. Where large amounts were recovered?

A. I think so.

Q. How long have you known Mrs. Monaghan?

[64]

A. Fifteen years.

Q. Have you had an opportunity to observe her while she was practicing law? A. Yes.

Q. State to the Court your opinion of her ability and integrity as a lawyer.

(Testimony of Francis D. Crable.)

A. Her ability, I think I would consider her a very able lawyer. She is an attorney that has great energy, and has a knack of going after details and accumulating details such as she did in this particular case. She is untiring in her effort and in her work.

Q. What have you to say as to the fees when they are taken on a contingent basis rather than on a regular retainer, paid in advance? Do you think a lawyer is entitled to greater fees?

A. Always.

Q. And that proportion of your testimony would be about the same as Mr. Gust's?

A. Would be about the same as Mr. Gust's, and for the same reasons as given by him.

Q. I presume you heard the testimony given here in Court, given by Mrs. Monaghan and her associate counsel, Mr. Thomas W. Nealon?

A. I did, and I have also read Mrs. Monaghan's petition. [65]

Q. All right. Now, then, do you know—to save time, you heard the questions that I asked Mr. Gust. Based upon, or what you have heard in court here and what you know about these attorneys, both of them, taking into consideration the work that was done on a contingent basis, the results that were attained, the case was very hazardous, what would you say would be a reasonable fee?

A. Figuring in percentages, a reasonable fee for the combined services I would say would be seven and one-half per cent, or in dollars on Two

(Testimony of Francis D. Crable.)

Million, that would be One Hundred and Fifty Thousand. I heard the testimony of the attorneys who preceded me on the stand. Mr. Gust stated that he allowed some shrinkage, I think. I think another reason for feeling that the fee should not be ten per cent, and that is, that the matter has not yet been completed. The fund is not at this moment ready for distribution. There is further work to be done. While that should not lessen the value of the services rendered by these attorneys, nevertheless, I think it is something that the Court would consider, and that is why I feel that seven and one-half per cent is fair and reasonable.

Q. I take it, then, you took into consideration the fact that while the effort of these [66] attorneys resulted in impounding into the Court in behalf of the creditors Two Million Dollars, the estate still has to be liquidated, money has to be liquidated and paid out?

A. Yes, I understand this litigation is pending still.

Mr. Morgan: I believe that is all, Mr. Crable. Does the Court have any questions?

The Court: No.

Mr. Morgan: Q. Now assume, Mr. Crable, that Mrs. Monaghan's petition and Mr. Nealon's petition are to be separately entertained and that the fees are to be allowed to each of them separately, what would you say would be the correct proportion or amount to allow Mrs. Monaghan?

(Testimony of Francis D. Crable.)

A. First, Mr. Morgan, I have the same opinion of Mr. Nealon as has been expressed by the other attorneys.

Q. Yes.

A. A high regard for his ability and integrity and character. I have—it is my impression that—in fact, I got this from Mrs. Monaghan's testimony, that Mr. Nealon was in court in the major matters. As against that, however, I off-set that by the fact that Mrs. Monaghan was the one who was employed. In other words, this is her case, and [67] the matter of to whom the business comes is an element to be considered, I think, in fixing a fee, so off-setting the fact it was her case against Mr. Nealon's appearances in court, I would have no hesitancy in saying that the division should be equal.

Mr. Morgan: Thank you, sir. Mr. Clark.

(The witness was excused.)

E. S. CLARK

was called as a witness on behalf of Petitioner Monaghan, and being first duly sworn, testified as follows:

Direct Examination

Mr. Morgan:

Q. What is your name, please?

A. E. S. Clark.

(Testimony of E. S. Clark.)

Q. And your profession, may I ask, for the record?

A. Well, in my own opinion I am a lawyer.

Q. How long have you been practicing law, Mr. Clark?

A. Pretty close to a half century, now.

Q. Mainly, I believe, in Arizona?

A. Nearly all the time in Arizona.

Q. However, I think you have tried cases in [68] California, New Mexico and elsewhere?

A. Oh, yes. I was still a "sage brush lawyer".

Q. You are admitted to all the Federal Courts, including the Supreme Court of the United States?

A. Yes.

Q. At the present time I believe you are a resident of Phoenix? A. Yes.

Q. Prior to that time you were a resident of——

A. (Interrupting): Prescott.

Q. Now then, during your experience as an attorney, have you had occasion to be involved in cases of considerable magnitude?

A. Yes, I have been involved in at least two, involving something over Two Million Dollars.

Q. Here is Arizona? A. Yes.

Q. Have you represented plaintiffs in class suits of this character?

A. I don't think in a case exactly like this I ever did. I have represented class plaintiffs in suits somewhat similar, but not exactly like this one.

Q. That is, corporate suits, minority stockholders, I presume? A. Yes. [69]

(Testimony of E. S. Clark.)

Q. You are familiar with the fees, I take it, that should be allowed counsel, are entitled to in cases where fees are charged on the contingent basis?

A. I think so, Mr. Morgan. I have been observing those matters for a good many years.

Q. Do you agree with Mr. Gust that where fees were taken on a contingent basis they should be greater proportionately than those paid in advance on a regular retainer?

A. I certainly do.

Q. You agree with his proportions?

A. Not entirely. I think in a case like this, being exceptional, as I view it, the allowance to the attorneys eventually should be considerably more than in the ordinary contingent case.

Q. You were in court, I take it, and heard the testimony given by Mrs. Monaghan, and also that given by her associate counsel, Mr. Thomas W. Nealon?

A. I was, yes.

Q. You have also read the verified petition of Mrs. Monaghan, detailing the work that was done and the results accomplished?

A. Yes, I have read it carefully.

Q. Now, are you acquainted with Mrs. Monaghan? [70]

A. Oh, for more years, I guess, than I ought to confess on the stand. Ever since she came to Arizona, Mr. Morgan.

Q. Have you had an opportunity to view her legal work, observe her capabilities as a lawyer?

(Testimony of E. S. Clark.)

A. Yes, quite often.

Q. Just frankly state to the Court your opinion of her ability and integrity and general standing as an attorney in this community and in this State.

A. Well, I am inclined to agree with what Mr. Crable said about that. She is very energetic, pains-taking lawyer with a genius for acquiring information; that is, of importance in a case she happens to be associated in. I think she is a lawyer of high character and somewhat, at least as far as women lawyers are concerned, exemplary.

Q. You are also acquainted with Mr. Nealon?

A. Very well.

Q. How long have you known Mr. Nealon?

A. Well, I have known him, I should say, close to fifteen years.

Q. Are you able to make a statement as to his ability as a lawyer?

A. Yes, I think he is a lawyer of very high ability and unimpeachable integrity, and a very [71] successful lawyer. He is highly diligent; he has an excellent conception of legal principles, and he knows very thoroughly how to apply them. In all respects, I consider him a very high class lawyer.

Q. Now, Mr. Clark, taking into consideration the testimony of these witnesses, what you have read in the verified petitions, the fact that this work or employment was undertaken on a wholly contingent basis; that the case was highly hazardous; that it involved litigation and work consuming approximately three and a half years, and approximately

(Testimony of E. S. Clark.)

two and a half years of continuous work, also the court proceedings which have been testified to, or which are shown in the petitions, the difficulties encountered, the obstacles interposed, including intervention of the Bank Examiner of Utah, Mr. Malia: appeals to the Circuit Court of Appeals and to the United States Supreme Court; the questions which were involved in this particular case, and that as a result of the efforts of these attorneys, assets amounting to approximately Two Million Dollars have been impounded in court to the benefit of all creditors of the Association, what, in your judgment, would be a reasonable fee for such [72] services?

A. Well, Mr. Morgan, I find it difficult to think of a parallel case to this. I think this case involved more difficulties in the inception than almost any case I have ever had any knowledge of. It required not only accurate, but good judgment and a very thorough knowledge of the law applicable to the case, to start with. It required a vast amount of work as the petition reveals before counsel could even come to an intelligent judgment as to whether they should go ahead or not, and considering all those things and the fact that out of what looked to be at the time, because this case came to my attention early, and I am frank to say that I turned it down, I think it was a monumental achievement that these lawyers have brought about, and I agree with Mr. Gust and Mr. Crable that approximately One Hundred and Fifty Thousand Dollars would be a very fair and reasonable allowance.

(Testimony of E. S. Clark.)

Q. Assuming now that those petitions are to be entertained separately, and a separate allowance was to be made to the attorneys, are you able to express what should be allowed to Mrs. Monaghan?

A. Well, it would be very difficult, as both Mr. Gust and Mr. Crable said, to arrive at a just [73] estimate of the value for the services rendered by each of these lawyers. I would prefer to put it on the same basis that they did, that whatever fee is finally allowed by the Court could be divided equally between them.

Mr. Morgan: That is all, and thank you very much. Now, Mr. McCluskey.

HENRY S. McCLUSKEY

was called as a witness on behalf of the petitioners, and being first duly sworn, testified as follows:

Direct Examination

Mr. Morgan:

Q. Your name, please?

A. Henry S. McCluskey.

Q. I believe you were the Receiver for the Intermountain Building & Loan Association?

A. Yes.

Q. First appointed as Receiver pendente lite and later finally appointed as Receiver? A. Yes.

Q. At the time of your appointment as Receiver and the assets were turned over to you, did you make an inventory of the assets of this Company?

(Testimony of Henry S. McCluskey.)

A. Yes, under authority of the Court, I employed [74] Mr. James A. Smith of the Plunkett Audit Company, a firm of public accountants, to make an inventory, and inasmuch as no inventory was available.

Q. Did you arrive finally at a fair valuation for these assets?

A. Well, what we did was took the book value inasmuch as the assets were distributed over many states and Canada, and due to the economic condition prevailing, the condition of the properties, the changing economic conditions, it was deemed advisable to eliminate the necessity for making an appraisal of the value of the properties, so the so-called book value of the properties as carried on the books of the Corporation was taken as the inventory value. Subsequently, in making my report, we took the book values and deducted from them the adjustments that had been made, and charged up as an asset comprising the interest that was based upon usurious charges and the interest and various other charges that was credited as assets, and eliminated those. We allowed them the losses that had been taken on realization, that is, being the difference between the so-called inventory or book value and what we had sold the properties for, and then cases where we had compromised the indebtedness for less than the [75] inventory or the book value, we took that as a book loss, and then with reference to the properties that remained in our possession in Arizona, based upon my inspection and some appraisals that had been made, we estimated what

(Testimony of Henry S. McCluskey.)

the fair, or what we believed the fair value as of the time we made the report, and upon those factors we arrived at what we believed was the present, or the value of the assets at the time we turned them over to Mr. Hill. With reference to the assets in foreign states, based upon the information that was available in the files and upon appraisals that had been made and that were available, we estimated there would probably be a loss up to forty per cent upon realization.

With reference to certificate loans; that is, where a certificate holder had borrowed and given his note and had put up his certificate as security for the loan, we took them on their face value as to an off-set, that one would off-set the other, and upon those factors combined we arrived at the figure that was stated in the report at approximately Two Million Dollars, Two Million, One Hundred Thousand, I think.

Q. Yes, about Two Million, One Hundred Thousand.

A. In round figures, and that is to the best [76] of my ability, that is the estimate we placed upon the value of the assets.

Q. That would be approximately the amount that these attorneys brought into the jurisdiction of the Court by their efforts? A. Yes.

Mr. Morgan: That is all unless the Court has some questions.

(The witness was excused).

JAMES A. SMITH

was called as a witness in his own behalf, and being first duly sworn, testified as follows:

Direct Examination

Mr. Morgan:

Q. What is your name?

A. James A. Smith.

Q. Where do you reside, Mr. Smith?

A. Phoenix, Arizona.

Q. What is your profession?

A. I am the managing partner of the W. H. Plunkett Audit Company, a partnership doing public accounting. I, myself, am a certified public accountant in the State of Arizona.

Q. How long have you been an accountant?

A. I have been an accountant for the last [77] twenty years. I have been a certified accountant since 1926, when I took the examination for the degree of Certified Public Accounting with the American Institute of Accountants, and hold that certificate.

Q. Prior to 1932 and 1933 had you handled building and loan accounts?

A. Yes, I had been handling some building and loan accounts.

Q. Was that sort of special work?

A. Yes, that was special work, because of the fact building and loan accounting is entirely different than any banking or any mercantile, or any other type of financing. A building and loan is a specialized thing.

Q. In a general way, have you made—have you

(Testimony of James A. Smith.)

practiced your profession and made accounting jobs in the State of Arizona?

A. Yes, I have done work for the State of Arizona throughout the State of Arizona. I have handled banking work for defunct banks, such as the bank that went broke over in Duncan, the Bank of Duncan, and the Bank of Safford. I handled the Building and Loan Association in Tucson that went broke and made an audit for the benefit of the Banking Department. I have handled accounts throughout [78] the State and other states.

Q. What are the usual fees and charges on a per diem basis?

A. Well, the fee basis varies, depending on the nature of the work. It has been customary throughout the past years for certified accountants to receive from twenty to thirty-five dollars a day for their work. That was up until some time around 1927 or 1928. Thereafter, the fees began to be more popularly increased as the work of the accountants was better understood. In my own office, the fees that have been charged by Mr. Plunkett, my senior partner, and myself, he also being certified, ran from thirty-five to fifty dollars a day for ordinary office work, and from fifty to a hundred dollars a day for court work, and usually fifty dollars a day for court preparatory work. In addition to that—that is the regular per diem. That is a 7-hour accountant's day, nine to five, or any other 7-hour period. Court work constitutes the length of the day. If it is five hours, six hours or seven, it does not make any difference.

(Testimony of James A. Smith.)

Q. Where specific specialized knowledge is required, such as in building and loan cases, would that demand or authorize a greater charge? [79]

A. Well, in the beginning, from the legal standpoint which would be involved in that case, yes, because of the fact that the specialized type is something that lies purely within the mind of the man who has had experience. It is not general knowledge. It is specific knowledge, and, therefore, it has greater value whether it be a building and loan or anything else. If it was something specifically required and had a relation to a man's particular knowledge and ability, it would be more valuable than general work.

Q. When your fees are contingent, are you authorized and is it usual to charge a greater fee?

A. Oh, yes, invariably. Contingent fees are usually double whatever we might have charged under usual circumstances, and so allowed by the Court. Contingent fees are considered at least double to the amount of the regular fee.

Q. Will you state to the Court briefly your activity in the present case?

A. In the present case, Mrs. Monaghan and Mr. Nealon came to me. I don't recall at this time who preceded the other, but it was with the knowledge of both. I know that they came to me and asked me if I would help them in the matter of this Association in determining certain factors. [80] First, we went upon a hypothetical basis purely. We assumed and thought of various things and discussed the accounting methods that we happened to have some

(Testimony of James A. Smith.)

knowledge of. We discussed the accounting methods as they should be, and I made special research into matters pertaining to building and loan financial costs, actuarial tables, cost of money, and the general practice in building and loan associations, and made, at a later date, calculations. Mrs. Monaghan had made some calculations based upon some reports from Utah. I supplemented those calculations and checked thoroughly all that she had made, and made a more detailed schedule of the operations and schedules of the cost and the cost of money to the full schedule of the losses that must have been engendered throughout the period. There were conferences on matters and policies, conferences as to witnesses, conferences as to the general trends, whether or not the testimony was going in in a proper way, and an analysis of testimony on building and loan matters in other similar Intermountain cases.

I very often attended Court. In fact, up until the time the final suit, the final hearing I have, nearly every time Judge Nealon and Mrs. Monaghan came in this court or any other court, I accompanied [81] them, and besides that, I took part in all proceedings. In other words, assisted the attorneys in getting information and analyzing it for their benefit.

That, briefly—it is all set out in the exhibit I set forth, and that is set forth in Mrs. Monaghan's—

Mr. Morgan: I believe you submitted a memorandum?

A. Yes, I submitted a memorandum.

(Testimony of James A. Smith.)

Q. Just a repetition? A. That is right.

Q. Do you now swear that the statements made in that memorandum, Exhibit A attached to Mrs. Monaghan's petition, are true? A. I do.

Q. How many days approximately did you spend on this work?

A. Well, at the time we started in, I kept a memorandum. It was customary to keep a memorandum in our office at that time. At the time of my employment, but after it dragged down for a period of time, we moved our offices, and those original memoranda were lost, but there was still considerable work having to be gone over, and not having recalled the definite specific amount of [82] time, I would say, and as I remember, that the time involved was somewhere between 120 and 150 days. In other words, from about four, four and a half or five months time. They would spend as much as a week or ten days at a time continuously, and at other times it would spread out over the entire investigation.

Q. During all that period your office was open to them?

A. My office and library, which is very extensive in the matters of accounting and a great deal of law, and my office machinery or equipment, anything that required stenographic service, my office was open at any time it was required.

Q. Did this work present difficulties in accounting by reason of the lack of records?

A. Yes, the work presented difficulties from any other accounting that might be ordinarily had in

(Testimony of James A. Smith.)

this respect, that we had only sworn statements of reports, or sworn reports which showed the assets and liabilities in the Association as stated by the Association, and showed a summary only of the gross receipts and the gross disbursements. There was no books of original entries to which we could have access. We could not have an orderly method, such as the employees, the juniors and [83] seniors all working out the accounting from the books of original entry. It had to be done from certain assumptions of facts and then taking specific reports and breaking them down, as we call accounting, to determine wherein the weakness lay. In other words, when it became apparent in breaking down the accounting where liabilities were not truly shown, we had to find out just where, and we had to do that in all of the phases which made it very hazardous, because of the fact when an accountant is called on the witness stand to testify to the solvency or insolvency of a corporation from an examination, the burden rests upon his shoulders. In the event he should have been foolish enough, he might attempt to prove the solvency, and then the testimony which would be given, it would affect your case, perhaps, from the serious financial condition that would later arise.

Q. I believe your work was mostly with Mrs. Monaghan in the beginning?

A. My work was with Mrs. Monaghan in the beginning because Mrs. Monaghan and I went over these figures as to the earnings and the various rates

(Testimony of James A. Smith.)

of money, and so forth, and that was in the inception, I think, before the suit was ever filed [84] at all, in order to find out whether or not we had something.

Q. You recall studying the report she procured from Utah? A. Yes.

Q. You worked back from those, I understand?

A. Yes.

Q. The result of that work, you were able to show a state of insolvency? A. Yes, indeed.

Q. Are you able to say now approximately how much money, on an average, this corporation was losing or was dissipating?

A. Well, they were dissipating profits and losing money as a direct result of the failure to have profits at the progressive rates. In other words, the more business they sold, the faster they were going broke, but the more readily it was covered up, so that the progression was increased as the years went by from 1920 to 1932. As I recall, there was close to \$30,000.00 deficit, a loss in the first year's operation, and thereafter it varied upward until it finally arrived at somewhere near \$200,000.00 in one year.

Q. If that continued, nothing would have been left for the creditors? [85]

A. On the ratio they were losing money to the operations as of 1932, had that continued over a period of a very few years, they would have been absolutely without assets.

Q. Now, what do you fix as a reasonable value for your services?

(Testimony of James A. Smith.)

A. I fix a value of \$10,000.00 as the amount that I have plead to Judge Nealon and Mrs. Monaghan, and as a reasonable value for my services.

Q. By the way, have you been paid anything at all? A. No, I have never received a dime.

Q. What was your agreement with counsel?

A. My agreement with counsel was that in the event anything came out of this, they would petition the Court for a proper and reasonable allowance for my services.

Mr. Morgan: That is all.

The Witness: No other value.

Mr. Morgan: I believe that is all, Mr. Smith.

(The witness was excused).

Mr. Morgan: Mr. Sperry. [86]

RALPH E. SPERRY

was called as a witness on behalf of the Petitioner Smith, and being first duly sworn, testified as follows:

Direct Examination

Mr. Morgan:

Q. What is your name?

A. Ralph E. Sperry.

Q. Where do you reside?

A. Los Angeles, California.

Q. What is your profession?

A. Certified public accountant.

(Testimony of Ralph E. Sperry.)

Q. Are you a graduate accountant?

A. A graduate of the University of Illinois.

Q. What year? A. 1918.

Q. Did you do special work later on in Illinois?

A. Yes, I was for a year and a half engaged in public accounting work in Chicago.

Q. Were you admitted there as a certified public accountant? A. Yes, sir.

Q. Since that time where have you been?

A. I came out to California in 1921, in the Fall, with the Security Trust & Savings Bank in [87] Los Angeles from December, 1921, to December, 1928.

Q. Are you a certified public accountant of that state? A. I am.

Q. In a general way, will you state just very briefly what your experience in accounting has been?

A. It has been general during the period in Chicago. It has been general during the last two or three years preceding to the—it has been specialized as to financial matters principally, I should say, from 1921 to about 1935.

Q. Have you been engaged, for instance, in accounting in a corporate reorganization?

A. I have.

Q. Have you done court work?

A. I have.

Q. In connection with estates?

A. During the period, I think 1932 to October, 1935, I was President of the Management Corporation, a subsidiary of Banks-Humby & Company,

(Testimony of Ralph E. Sperry.)

stock and bond dealers of Los Angeles, California, who organized this corporation to work out as effective as possible reorganizations for certain default real estate bond dealers and certain other dealers they had an underwriting interest in. During that time I served as Secretary, I think. [88]

Q. I take it you are familiar with the character of work that has been testified to by Mr. Smith?

A. Not so much his own work as I am with the general type of work, yes, sir.

Q. Is it usual for accountants to charge per diem rates?

A. That is the more ordinary type of basis.

Q. What is the usual charges in your—

A. (Interrupting) Twenty-five to Fifty Dollars per day or up, depending on the type of services.

Q. And what are the proper charges for court appearances?

A. Fifty to One Hundred Dollars per day, or up.

Q. In accounting work, what do you call a day, how many hours?

A. Straight accounting work, about seven hours.

Q. Now, where work is done on a contingent basis, is it proper to charge an additional amount?

A. Distinctly.

Q. In special cases requiring specialized knowledge, is it proper, in your profession, to charge special fees beyond the ordinary rates?

A. Yes, sir.

Q. What is the reason for that; what is the [89] basis for it?

(Testimony of Ralph E. Sperry.)

A. Because all that an accountant or an attorney has to sell is his services, and where his services are marked as special value, it is entirely proper to have that value recognized in the fee.

Q. You were in court and heard the testimony of Mr. Smith? A. Yes, sir.

Q. You also heard Mrs. Monaghan's testimony concerning the work he did? A. I did.

Q. Now, then, based upon that testimony, assuming that an accountant of Mr. Smith's ability—by the way, did you know Mr. Smith—have you known him before this time?

A. Not before this time, no, sir.

Q. Assuming an accountant, especially an accountant, a certified public accountant who has practiced his profession for a number of years and is an able accountant, is employed by a number of attorneys in this case to represent them in the work, in the matter concerning the recovery from a corporation more than Two Million Dollars for the benefit of creditors, and assume that that accountant has been called upon to make [90] an analysis of reports in order to reduce the status of the corporation as to solvency or insolvency, and, further, that the books of original record are missing from which audits are usually made, but that through research and general knowledge the necessary information to show the true facts by analysis and otherwise is obtained, and a conclusion reached as to the solvency or insolvency, and that that service is extended over a period of more than two years, in-

(Testimony of Ralph E. Sperry.)

cluding approximately 125 to 150 days, as testified to in court here, what would you say would be a fair charge for such services?

A. On a contingent basis?

Q. On a contingent basis, yes.

A. I should say \$15,000.00.

Q. Upon what do you base than answer?

A. I base it upon the unusual characteristics of the work itself, upon the benefit to the client, upon the hazards involved, the risks taken from the inception, when even after a year's work may have been completed, some particular thing might throw the whole case out; upon questions as to when the fee might be paid, if even earned, the various contingencies involved, particularly having in mind the significant qualities of the [91] service itself, as I have heard them expressed in the court room today.

(The witness was excused.)

Mr. Morgan: I think that is all. That, your Honor, completes the case on behalf of this petitioner. You have something further?

Mr. Nealon: No, I want to make a couple of motions if you are through.

Mr. Morgan: Yes.

Mr. Nealon: I want to file two separate—introduce petitions and memorandums on points of authorities, and in doing so, I file this petition asking first that the sum of \$1,330.40 for the out-of-pocket expenses which I have testified to, and to which your Honor is directed, I think that should be a separate order, and it will be very acceptable if that payment

was made. I may prefer—I will make the motion now for payment of the \$1,330.40 to me for my out-of-pocket expenses here. Your Honor can rule on it after you give it consideration.

Now, I am looking at this case a little bit from that viewpoint of a man seventy years of age. I don't think in the present state of the case that all of the fees should be paid at the present time. Witnesses on the stand have [92] testified to the part I was going to bring up myself, but I do think it will be only fair to the attorneys in the case that at the present an allowance of some like amount would be proper. I, therefore, am filing this petition, and am asking for an allowance of \$12,500.00 at the present time upon account of the fees. Your Honor can fix the fees at your leisure. I think these should be fixed on the percentage basis. This amount would be less than Five Dollars apiece, about Four-Fifty or Fifty-Eight from each of the people who have been benefited by the services. It would also leave in the treasury more than sufficient to declare a ten per cent dividend to these creditors, and I may say personally that I see no reason why a dividend should not be declared at any time your Honor deems proper. You can sustain the payment of the dividend so far as those people are claiming under the statutes out of the State, and about \$12,500.00 will help an attorney to get along especially after he has been out of money as I have been in this case. I submit this and make the motion.

The Court: All right. Let the record show it is submitted.

Mr. Nealon: And I will furnish you these [93] points on authorities which I think cover every phase on the allowance of this. I want to call your attention to the two cases, one in the Circuit Court where ten per cent was allowed.

Mr. Morgan: Have you got a copy of this?

Mr. Nealon: Yes, I have.

Mr. Morgan: I have numerous decisions I would like to call to your Honor's attention to, but I presume Mr. Nealon has already done it. Was the \$12,500.00 for yourself individually?

Mr. Nealon: That is for myself.

Mr. Morgan: I was going to state that Mrs. Monaghan, in addition to the Two Hundred and some odd dollars included in her associate counsel's report, says that she has spent \$301.65. I didn't have her testify to that because it was in her petition, \$301.65, and if, of course if there are intermediary allowances, we think it would be highly proper to make some immediate allowance to both of them, and that \$301.65 should be repaid to her at once, together with such amount that the Court sees fit to allow immediately, if the Court decides to handle it that way, and that also some provision should be made for the payment of Mr. Smith, because his work was of a very high character, and he assisted the attorneys greatly. [94] In fact, probably the case could not have been won without Mr. Smith's services.

I have, I say, any number of authorities on the exhibit. Ordinarily, the fees that are allowed in these cases, even by the Supreme Court of the

United States, is right close to \$50,000.00 where there is a recovery and payment over to the client. Of course, as stated by counsel that we put on the stand, that ten per cent probably should be decreased to some extent, because of the fact that the administration of the fund and the liquidation of the fund requires further, additional services. That is to say, if these Two Million, immediately upon the entry of the decree could have been paid over to the creditors, then unquestionably these counsel would have been entitled to, under the decisions, to that amount as a fair and just fee, but in view of the fact it has to be liquidated over a period of years, possibly, that amount should be reduced.

The Court: All right. The record may show the matter is submitted.

(The hearing was ended at four-forty-five o'clock, P. M., of the same day.) [95]

I hereby certify that the proceedings had upon the trial of the foregoing cause are contained fully and accurately in the shorthand record made by me thereof, and that the foregoing 95 typewritten pages are a full, true and accurate transcript of said shorthand record.

LOUIS L. BILLAR

Shorthand Reporter.

[Endorsed]: Filed Feb 23, 1943.

[Endorsed]: No. 10408. United States Circuit Court of Appeals for the Ninth Circuit. Elizabeth G. Monaghan, Appellant, vs. Harry W. Hill, as Receiver of Intermountain Building and Loan Association, a corporation, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the District of Arizona.

Filed April 23, 1943.

PAUL P. O'BRIEN

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the District Court of the United States
for the District of Arizona

No. 10408

No. E-268-Phoenix

GUADALUPE R. GALLEGOS, et al.,

Plaintiffs,

vs.

INTERMOUNTAIN BUILDING & LOAN
ASSOCIATION, a corporation,

Defendant.

STATEMENT OF POINTS ON WHICH ELIZABETH G. MONAGHAN INTENDS TO RELY ON THE CONSIDERATION OF HER APPEAL.

Pursuant to Rule 19 (6), Rules of the United

States Circuit Court of Appeals for the Ninth Circuit, the appellant files this Statement of Points upon which she intends to rely on the consideration of her appeal:

I.

That the court erred in making its finding of fact No. XVIII, on the ground that the same is not supported by the evidence, and is contrary to the evidence, in that the record shows that the expenses incurred and for which reimbursement was asked, were in addition to those set up by petitioner Nealon in his petition and paid to him, and that it was an abuse of sound judicial discretion for the court to deny to the petitioner the costs and expenses necessarily incurred by her in the litigation.

II.

That the court erred in making its finding of fact No. XIX, on the ground that the same is not supported by the evidence, and is contrary to the evidence, in that the evidence conclusively shows that Mr. Smith's work, preparation and evidence were essential to establishing plaintiffs' case and that the same could not have been established without such preparation, work and evidence; and in that one jointly interested with others in a common fund, and who in good faith maintains the necessary litigation to save it from waste and destruction, and to secure its proper application, is entitled, in equity, to reimbursement of his costs as between solicitor and client, or out of the fund itself or by proportionate contributions from those who receive

the benefit of the litigation, and it was an abuse of sound judicial discretion for the court to deny costs for the services of James A. Smith, C.P.A.;

III.

That the court erred in making its finding of fact No. XX, on the ground that the same is not supported by the evidence, and is contrary to the evidence; and that the services rendered by the appellant as one of the attorneys for the receiver, subsequent to the adjudication of insolvency and his appointment as receiver, have no application to the value of the services in instituting and prosecuting to a successful conclusion the original action for which compensation is sought; are entirely independent thereof, and are not a proper element to consider in determining appellant's compensation as attorney for the plaintiffs and those similarly situated; and it was an abuse of discretion and inequitable for the court to take into consideration the compensation for such services rendered the receiver subsequent to his appointment. in fixing the fee for the attorney for the petitioning creditors in the original action;

IV.

That the court erred in making its finding of fact No. XXII, on the ground that the same is not supported by the evidence, and is contrary to the evidence, and is unreasonable, grossly inadequate, arbitrary and inequitable, and does not reasonably compensate appellant for the services rendered and

costs incurred, considering the amount of the fund brought into court by the services of the petitioner; the time and amount of work involved; that the case was extremely hazardous; the many unique and complex principles and facts involved which were not easily demonstrable; the conflicting claims as to state and federal jurisdiction, including the claims of statutory liquidators; the fact that the case was vigorously contested in the District Court, with appeals to the Circuit Court and to the United States Supreme Court; and that most of the litigation was determined prior to the appointment of the judge fixing the fee;

V.

That the court erred in making its finding of fact No. XIV, in that it established an inequitable premise upon which to calculate and base an equitable fee for counsel bringing the fund into court, and it was an abuse of sound judicial discretion for the court to establish such premise in fixing the fee for the attorney for the petitioning creditors in the original action;

VI.

That the conclusion of law No. (1) is based on the erroneous finding of fact Nos. XIV, XX and XXII; is contrary to law and equity, and to the evidence, for all the reasons set forth hereinabove in paragraphs III, IV and V;

VII.

That the conclusion of law No. (2) is based on the erroneous finding of fact No. XVIII; is contrary to law and equity, and to the evidence, as set forth hereinabove in paragraph I;

VIII.

That the conclusion of law No. (3) is based on the erroneous finding of fact No. XIX; is contrary to law and equity, and to the evidence, as set forth hereinabove in paragraph II;

IX.

That the court erred in entering its order fixing the total compensation of Elizabeth G. Monaghan on account of services rendered by her as an attorney in the preparation, institution and trial of the foregoing and numbered cause, as set forth in her petition, at \$12,500.00, on the ground that said order is based on the erroneous findings of fact Nos. XIV, XX and XXII, and on the erroneous conclusion of law No. (1); and on the further ground that the same is not supported by the evidence, and is contrary to the evidence, and is unreasonable, grossly inadequate, arbitrary and inequitable, and does not reasonably compensate appellant for the services rendered, and for all the reasons set forth hereinabove in paragraphs III, IV and V;

X.

That the court erred in entering its order denying to appellant the expenses and allowances necessarily incurred by her in the preparation and prosecution,

of the original action, as set forth in her petition, on the ground that said order is based on the erroneous findings of fact Nos. XVIII and XIX, and on the erroneous conclusions of law Nos. (2) and (3), and is contrary to law and equity; and on the further ground that said order is not supported by the evidence and is contrary to the evidence, for the reason that said costs were necessary and essential to the successful bringing and prosecuting of said action, and for all the reasons set forth hereinabove in paragraphs I and II;

XI.

Where an attorney institutes litigation for clients, and with the consent of clients associates another attorney, the acceptance of an inequitable fee by the attorney so associated cannot deprive the attorney bringing the suit of a reasonable fee, especially where the associate counsel has good grounds not to contest the inadequacy of the fee.

XII.

The Circuit Court of Appeals may increase the allowance to the appellant without disturbing the allowance to the associate counsel.

Dated at Phoenix, Arizona, this 12th day of April, 1943.

HENRY S. McCLUSKEY,
Attorney for Elizabeth G.
Monaghan.

Received copy of the foregoing Statement of Points this 12th day of April, 1943.

LOUIS B. WHITNEY

Attorney for Harry W. Hill, as Receiver of Intermountain Building and Loan Association, a corporation.

[Endorsed]: Filed Apr. 24, 1943. Paul P. O'Brien, Clerk.

[Title of District Court and Cause.]

STIPULATION AND DESIGNATION OF PORTIONS OR PARTS OF THE RECORD TO BE PRINTED AND DEEMED NECESSARY FOR THE CONSIDERATION OF THE APPEAL OF ELIZABETH G. MONAGHAN

It is Stipulated by and between the petitioner, Elizabeth G. Monaghan, through her attorney, Henry S. McCluskey, Esquire, and Harry W. Hill, as receiver of Intermountain Building & Loan Association, an Utah corporation, through his attorney Louis B. Whitney, Esquire, that the Decision of the United States Circuit Court of Appeals for the Ninth Circuit, dated August 5, 1935, (Case No. 7516 in said court) and reported in Volume 78 Fed. (2) at pages 972, et seq., and the Order of the United States Supreme Court denying writ of certiorari in said matter, reported in Volume 206 U. S. at page 639, may be considered by the United States Circuit Court of Appeals for the Ninth Circuit in this

appeal, as though the same were printed in full in the record, but that the same need not be printed by the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit in said Record.

It Is Further Stipulated that the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit shall include in the printed record on said appeal, the following:

1. Amended Bill of Complaint, filed June 23, 1933; (T. R. pp. 5-31)

2. Affidavit of James A. Smith, filed April 18, 1933; (T. R. pp. 32-34)

3. Mandate of the United States Circuit Court of Appeals for the Ninth Circuit in Case No. 7516, entered in the above captioned matter on December 2, 1935; (T. R. pp. 35-37)

4. Petitioner Monaghan's Exhibit "B" in evidence, including Statement of James A. Smith attached thereto; (T. R. pp. 38-88)

5. Petitioner Nealon's Exhibit No. 3 in evidence; (T. R. pp. 89-133)

6. Petitioner Nealon's Exhibit No. 4 in evidence, deposition of William H. Burges, (omitting the Notice of Taking Deposition, the Affidavit of Service of Notice and the further Affidavit of Thomas W. Nealon of receipt of the deposition, attached thereto;) (T. R. pp. 134-173)

7. Petitioner Nealon's Exhibit No. 5 in evidence, deposition of Samuel L. Pattee, (omitting the hypothetical question which is identical to that contained in the deposition of William H. Burges, but which may be considered by the Circuit Court of Appeals

for the Ninth Circuit as being asked the witness Samuel A. Pattee, but to save the record need not be reprinted; and omitting further the Notice of Taking Deposition, the Affidavit of Service of Notice and the Affidavit of Thomas W. Nealon of receipt of the deposition, attached thereto;) (T. R. pp. 183-187)

8. Those parts of petitioner Nealon's Exhibit No. 6 in evidence, being miscellaneous bills, receipts and checks, filed December 20, 1937, particularly designated as follows:

(a) Check of Thomas W. Nealon, dated March 20, 1933, numbered 2388, drawn on The Phoenix National Bank, Phoenix, Arizona, payable to the order of Brady & Acheson in the amount of \$20.00; together with invoice of Brady & Acheson in such amount addressed to Mrs. Elizabeth G. Monaghan, dated March 15, 1933, covering "Services in re Intermountain Building & Loan Association to date".

(b) Check of Thomas W. Nealon, dated March 22, 1933, numbered 2391, drawn on The Phoenix National Bank, Phoenix, Arizona, payable to the order of Brady & Acheson in the amount of \$5.00; together with invoice of Brady & Acheson in such amount addressed to Mrs. Elizabeth G. Monaghan covering "Services in obtaining building and loan report".

(c) Check of Thomas W. Nealon, dated April 25, 1933, numbered 2439, drawn on The Phoenix National Bank, Phoenix, Arizona, payable to Elizabeth G. Monaghan in the amount of \$12.00, with notation in upper lefthand corner "Marshal's serv-

ices", endorsed "Pay to Helen Elickson—E. G. Monaghan"; together with statement of United States Marshall rendered to Elizabeth G. Monaghan covering services rendered April 18, 1933, and showing receipt of payment April 26, 1933.

(d) Check of Thomas W. Nealon, dated March 23, 1933, numbered 2394, drawn on The Phoenix National Bank, Phoenix, Arizona, payable to Mrs. S. A. Nelligan in the amount of \$5.00; and unnumbered check of Thomas W. Nealon, drawn on The Phoenix National Bank, Phoenix, Arizona, payable to Mrs. S. A. Nelligan in the amount of \$12.00; together with notation accompanying above checks "Nelligan—clerical work \$17.00).

(e) Check of Thomas W. Nealon, dated April 22, 1933, numbered 2437, drawn on The Phoenix National Bank, Phoenix, Arizona, payable to the order of Arizona Corporation Commission in the amount of \$9.00, with notation in upper left-hand corner "cert. copy of incorp Intermountain Bldg. & Loan Assn. Utah"; together with official receipt of Arizona Corporation Commission, numbered 51206, dated April 22, 1933, evidencing payment of \$9.00, made to Thomas W. Nealon, covering certified copy of articles of incorporation "In re: Intermountain Building & Loan Assn." Receipt shows payment by check No. 2437.

(f) Check of Thomas W. Nealon, dated May 22, 1933, numbered 2453, drawn on The Phoenix National Bank, Phoenix, Arizona, payable to the order of County Recorder of Maricopa County in the amount of \$3.35; together with official receipt of

County Recorder of Maricopa County dated May 22, 1933, to Thomas W. Nealon, covering certified copy of mortgage—Vaughn Riggins, et ux. to Inter-mountain Bldg. & Loan Assn.

(g) Unnumbered check of Thomas W. Nealon, dated May 14, 1933, drawn on The Phoenix National Bank, Phoenix, Arizona, payable to the order of S. A. Nelligan in the amount of \$25.75, endorsed by S. A. Nelligan and cashed in Salt Lake City, Utah.

(Original documents sent to Circuit Court of Appeals.)

9. Final Order fixing attorney's fees and expenses, and ordering payment of balance due, (as to Elizabeth G. Monaghan) entered December 7, 1942; (T. R. pp. 202-205)

10. Final Order fixing attorney's fees and expenses, and ordering payment of balance due to Thomas W. Nealon, entered December 7, 1942; (T. R. pp. 206-209)

11. Findings of Fact and Conclusions of Law, made nunc pro tunc as of December 7, 1942; (T. R. pp. 192-200)

12. Stipulation dated March 5, 1943, as to filing of Findings of Fact and Conclusions of Law, nunc pro tunc; (T. R. p. 201)

13. Reporter's transcript of evidence on hearing of petitions of Elizabeth G. Monaghan and Thomas W. Nealon;

14. Notice of Appeal; (T. R. p. 228)

15. Bond on Appeal; (T. R. pp. 229-230)

16. Schedules "A", Trial Balance as of December 31, 1939; "B", Real Estate Loans, December 31, 1939; "C", Real Estate Contracts, December 31, 1939; "D", Real Estate owned, December 31, 1939; and "E", Real Estate sold, December 31, 1939, all attached to verified Report and Account of Harry W. Hill, as Receiver of Intermountain Building & Loan Association, an Utah corporation, filed March 20, 1940; (T. R. pp. 189-191)

17. Report and Account of Harry W. Hill, as Receiver of Intermountain Building & Loan Association, an Utah corporation, filed February 23, 1943; (T. R. pp. 210-227)

18. Elizabeth G. Monaghan's Amended Designation of parts of record to be transmitted to the United States Circuit Court of Appeals, filed March 18, 1943; (T. R. pp. 237-239)

19. Harry W. Hill's Designation of Additional portions of the Record, proceedings and evidence to be transmitted to the United States Circuit Court of Appeals, filed March 18, 1943; (T. R. pp. 240-242)

20. Order that original portions of Exhibit No. 6, be sent to the United States Circuit Court of Appeals for the Ninth Circuit in lieu of copies thereof; (T. R. pp. 234-235)

21. Stipulation and Designation of portions or parts of the record to be printed, and deemed necessary for the consideration of the appeal of Elizabeth G. Monaghan;

22. Statement of Points on which Elizabeth G. Monaghan intends to rely on the consideration of

her appeal, dated April 12, 1943, and filed pursuant to Rule 19 (6), Rules of the United States Circuit Court of Appeals for the Ninth Circuit.

Dated at Phoenix, Arizona, this 12th day of April, 1943.

HENRY S. McCLUSKEY

Attorney for Elizabeth G.
Monaghan

LOUIS B. WHITNEY

Attorney for Harry W. Hill, Receiver of Inter-
mountain Building & Loan Association, an
Utah corporation.

[Endorsed]: Filed April 24, 1943. Paul P.
O'Brien, Clerk.